*TOGETHER WITH NO. 279, ROYAL INS. CO. V. SAME, NO. 280, NAT. FIRE INS. CO. V. SAME, AND NO. 281, FIRE ASSOC. OF PHILA. V. SAME

CARD 1

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 278

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA

No. 279

ROYAL INSURANCE COMPANY, LTD., PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA

No. 280

NATIONAL FIRE INSURANCE COMPANY, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA

No. 281

FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 9, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,200, 35,201, 35,202, 35,203)

(35,200, 35,201, 35,202, 35,203)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 278

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA

No. 279

ROYAL INSURANCE COMPANY, LTD., PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA

No. 280

NATIONAL FIRE INSURANCE COMPANY, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA

No. 281

FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Proceedings in United States circuit court of appeals, tenth circuit	*a*	1
Caption.....(omitted in printing)..	*a*	
Record from district court of the United States, Western Oklahoma	1	1

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1930

	Original	Print
Note re citations	1	1
Notice of appeal and acknowledgment of service, case No. 3473	1	1
Order extending time to lodge record in appellate court.	2	2
Order extending time to lodge record in appellate court.	2	3
Petition, filed in State court, case No. 3473	3	3
Petition for removal, filed in State court, case No. 3473.	4	5
Notice of removal, filed in State court, case No. 3473	6	7
Note re bond on removal, filed in State court, case No. 3473	7	7
Order of removal, filed in State court, case No. 3473	7	8
Answer to petition, case No. 3473	8	9
Motion to make answer more definite and certain, case No. 3473	10	11
Order overruling motion to make more definite, etc., case No. 3473	11	12
First amended petition, case No. 3473	11	12
Exhibit A—Letter, Fuller Adjustment Co. to V. Langston	17	18
Demurrer to first amended petition, case No. 3473	17	19
Order overruling demurrer, case No. 3473	18	19
Answer to plaintiff's first amended petition, case No. 3473	18	20
Petition, filed in State court, case No. 3481	22	24
Exhibit A—Royal Insurance Co. policy (Oklahoma standard form)	23	26
Special appearance motion, filed in State court, case No. 3481	38	42
Petition for removal, filed in State court, case No. 3481	39	43
Notice of removal, filed in State court, case No. 3481	41	44
Note re bond for removal, filed in State court, case No. 3481	41	45
Order of removal, filed in State court, case No. 3481	42	45
Order granting leave to withdraw motion, etc., case No. 3481	43	47
Demurrer, case No. 3481	43	47
Order granting leave to withdraw demurrer, etc., case No. 3481	44	48
Motion to make more definite and certain, case No. 3481	44	48
Order on motion to make more definite and certain, case No. 3481	45	49
Motion to dismiss, case No. 3481	45	49
First amended petition, case No. 3481	46	50
Note re Exhibit "A"	51	56
Motion to dismiss, case No. 3481	51	56
Demurrer to first amended petition, case No. 3481	52	57
Order on motion and demurrer, case No. 3481	53	58
Order overruling motion to dismiss, etc., case No. 3481	53	59
Answer to first amended petition, case No. 3481	54	60

	Original	Print
Reply to answer, case No. 3481	57	63
Petition, filed in State court, case No. 3482	59	64
Special appearance motion, filed in State court, case No. 3482	61	66
Petition for removal, filed in State court, case No. 3482	61	67
Notice of removal, filed in State court, case No. 3482	63	69
Note re bond for removal, filed in State court, case No. 3482	64	69
Order of removal, filed in State court, case No. 3482	64	70
Order granting leave to withdraw motion, etc., case No. 3482	65	71
Demurrer, case No. 3482	65	72
Order granting leave to withdraw demurrer, etc., case No. 3482	66	73
Motion to make more definite and certain, case No. 3482	67	73
Order on motion to make more definite and certain, case No. 3482	67	74
Motion to dismiss, case No. 3482	67	74
First amended petition, case No. 3482	68	75
Note re Exhibit A	73	81
Motion to dismiss, case No. 3482	73	81
Demurrer, case No. 3482	74	82
Order on motion and demurrer, case No. 3482	75	83
Order overruling motion to dismiss, etc., case No. 3482	76	84
Answer to first amended petition, case No. 3482	76	84
Reply to answer, case No. 3482	80	88
Petition, filed in State court, case No. 3483	81	89
Special appearance motion, filed in State court, case No. 3483	82	91
Petition for removal, filed in State court, case No. 3483	83	92
Notice of removal, filed in State court, case No. 3483	85	94
Note re bond for removal, filed in State court, case No. 3483	86	94
Order of removal, filed in State court, case No. 3483	86	95
Order granting leave to withdraw motion, etc., case No. 3483	87	96
Demurrer, case No. 3483	87	97
Order granting leave to withdraw demurrer, etc., case No. 3483	88	98
Motion to make more definite and certain, case No. 3483	88	98
Order on motion to make more definite and certain, case No. 3483	89	99
Motion to dismiss, case No. 3483	89	99
First amended petition, case No. 3483	90	100
Motion to dismiss, case No. 3483	95	106
Demurrer, case No. 3483	96	107
Order on motion and demurrer, case No. 3483	97	108
Order overruling motion to dismiss, etc., case No. 3483	98	109

	Original	Print
Answer to first amended petition, case No. 3483	98	109
Reply to answer, case No. 3483	102	113
Stipulation consolidating cases for trial	103	111
Journal entry of judgment, case No. 3473	103	115
Journal entry of judgment, case No. 3481	105	117
Journal entry of judgment, case No. 3482	107	119
Journal entry of judgment, case No. 3483	109	122
Motion for new trial, case No. 3473	111	124
Motion for new trial, case No. 3481	114	126
Motion for new trial, case No. 3482	116	129
Motion for new trial, case No. 3483	118	132
Order overruling motions for new trial	121	134
Order extending time to file bill of exceptions, case No. 3473	121	135
Order extending time to file bill of exceptions, case No. 3481	121	135
Order extending time to file bill of exceptions, case No. 3482	122	135
Order extending time to file bill of exceptions, case No. 3483	122	136
Bill of exceptions	125	136
Caption	125	136
Defendant's objection and demurrer to evidence	125	137
Testimony of V. I. Langston	126	137
Plaintiff's Exhibit No. 2—Daily report of insurance company	129	141
Plaintiff's Exhibit No. 3—Letter, dated January 20, 1926, to The Fuller Adjustment Co., signed clerk of board	138	151
Plaintiff's Exhibit No. 4—Letter, dated January 26, 1926, to Mr. V. I. Langston, clerk, signed Fuller Adjustment Company	140	153
Plaintiff's Exhibit No. 5—Letter, dated January 30, 1926, to Mr. Guy H. Fuller, Mgr., signed clerk of board	141	154
Plaintiff's Exhibit No. 7—Letter, dated February 8, 1926, to The Fuller Adjustment Co., signed clerk	141	157
Plaintiff's Exhibit No. 8—Letter, dated March 24, 1926, to trustees School District No. 98, signed Fuller Adjustment Company	152	166
Testimony of Lee Hall	166	181
A. E. Sloan	173	189
W. A. Northgrave	177	192
G. E. Autry	179	195
L. L. Hitt	192	209
R. M. Bailey	203	221
J. E. Quigley	207	225
Charles G. Morris	229	248
P. E. Perswell	236	255

	Original	Print
Testimony of Lloyd J. Mullen	261	281
George W. Kline	264	285
Guy H. Fuller	270	292
V. I. Langston (recalled)	271	293
Plaintiff's Exhibit 14—Specifications for Public School Building District No. 98	276	298
Defendant's demurrer to evidence	296	317
Testimony of E. E. Doggett	298	318
J. E. Wilkinson	302	327
Ward H. Fisher	305	331
Guy H. Fuller (recalled)	310	336
Lloyd J. Mullen (recalled)	331	359
Defendant's Exhibit "A"—List of figures with reference to fixtures, etc	334	362
Testimony of R. E. Perswell (recalled)	342	370
George W. Kline (recalled)	344	372
Frank L. Cableman	354	382
Defendant's motion for directed verdict	367	397
Charge to jury	368	397
Exceptions to charge	382	413
Prayer for approval of bill of exceptions	384	415
Plaintiff's approval of bill of exceptions	384	415
Order approving bill of exceptions	384	415
Order consolidating causes for purpose of appeal	385	416
Petition for appeal, case No. 3473	385	416
Assignment of errors, case No. 3473	386	417
Order allowing appeal and fixing bond, case No. 3473	389	422
Note re bond of supersedeas and appeal, case No. 3473	390	422
Petition for appeal, case No. 3481	390	423
Assignment of errors, case No. 3481	391	423
Order allowing appeal and fixing bond, case No. 3481	392	424
Note re bond of supersedeas and appeal, case No. 3481	392	425
Petition for appeal, case No. 3482	392	425
Assignment of errors, case No. 3482	393	426
Order allowing appeal and fixing bond, case No. 3482	394	426
Note re bond of supersedeas and appeal, case No. 3482	394	427
Petition for appeal, case No. 3483	394	427
Assignment of errors, case No. 3483	395	428
Order allowing appeal and fixing bond, case No. 3483	396	429
Note re bond of supersedeas and appeal, case No. 3483	396	429
Praecipe for transcript of record	396	430
Clerk's certificate to transcript (omitted in printing)	397	
Orders extending time	399	431
Appearances of counsel (omitted in printing)	399	
Motion to strike bill of exceptions	400	431
Order granting motion to strike bill of exceptions	400	432
Orders of submission (omitted in printing)	401	
Opinion, Lewis, J.	402	432
Judgments	410	441

	Original	Print
Petition for rehearing and for stay of mandates	413	413
Order denying rehearing	423	418
Application for stay of mandates	423	418
Order staying mandates	424	449
Note re supersedeas bonds	424	450
Clerk's certificate (omitted in printing)	425	
Orders allowing certiorari	426	450

[fol. a] [Caption omitted]

[fol. 1] (Citations in proper form, directed to appellee, were issued, and service of said citations accepted by counsel for said appellee, as follows:

Case No. 3473—Issued April 3, 1929; service accepted April 3, 1929.

Cases No. 3481, No. 3482 and No. 3483—Issued March 26, 1929; service accepted March 26, 1929.)

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA

No. 3473. Law

School District No. 98 of Payne County, State of Oklahoma, Plaintiff,

vs.

Concordia Insurance Company of Milwaukee, a Corporation, Defendant

Notice of Appeal—Filed April 5, 1929

To School District No. 98 of Payne County, State of Oklahoma, and Rainey, Flynn, Green and Anderson, its attorneys of record:

Please take notice that Defendant, The Concordia Fire Insurance Company of Milwaukee, a corporation, sued herein, as Concordia Insurance Company of Milwaukee, a corporation, intends to take and perfect its appeal from the judgment entered and rendered in the above entitled cause on the 18th day of January, 1929, and will on this day file and present its Petition for Appeal, together with Assignment of Errors, praying that its appeal be allowed.

H. C. Thurman, Attorney for Defendant.

Service of the foregoing Notice and the receipt of copies of Petition for Appeal, Assignment of Errors, Order allowing Appeal, and Bond of Supersedeas and Appeal is hereby acknowledged this 3rd day of April, 1929.

Chester H. Lowry, Rainey, Flynn, Green & Anderson.

[File endorsement omitted.]

[fol. 2] IN UNITED STATES DISTRICT COURT

No. 3473. Law

CONCORDIA FIRE INSURANCE COMPANY, a Corporation, Appellant,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Appellee

No. 3481. Law

ROYAL INSURANCE COMPANY, LTD., a Corporation, Appellant,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Appellee

No. 3482. Law

NATIONAL FIRE INSURANCE CORPORATION, a Corporation, Appellant

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Appellee

No. 3483. Law

FIRE ASSOCIATION OF PHILADELPHIA, a Corporation, Appellant,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Appellee

ORDER EXTENDING TIME—Filed May 25, 1929

It is this day ordered, for good cause shown, that the time in which the said appellants may docket said case and file a transcript of the record herein, in the United States Circuit Court of Appeals, be and the same is extended to July 24, 1929.

May 25, 1929.

Edgar S. Vaught, U. S. District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME—Filed July 22, 1929

It is this day ordered, for good cause shown, that the time in which the said appellants may docket said case and file a transcript of the record herein, in the United States Circuit Court of Appeals, be and the same is extended to September 24, 1929.

July 22, 1929.

Edgar S. Vaught, U. S. District Judge.

[File endorsement omitted.]

[fol. 3] IN DISTRICT COURT OF PAYNE COUNTY, STATE OF OKAHOMA

No. 8239

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Plaintiff,

vs.

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, a Corporation, Defendant

PETITION—Filed Oct. 28, 1926

Comes now the plaintiff above named, and, for cause of action against the defendant, alleges and states:

1. That the plaintiff is a School District duly organized under the laws of the State of Oklahoma and is authorized to sue and to be sued and to do business in its corporate name of School District No. 98, of Payne County, State of Oklahoma; the officers of the School Board of said District No. 98 being G. P. Brooks, Director; V. I. Langston, Clerk and J. E. Quigley, Member; this action being authorized and filed by direction of said School Board, and said School Board having been duly authorized to file this action at the last regular meeting of the legal voters of said School District.

2. That the defendant is a foreign corporation engaged in the Insurance business and duly licensed and authorized to do business within the State of Oklahoma.

3. That on the 24th day of October, 1925, the defendant for valuable consideration, to-wit: the sum of $ Dollars, which sum has been accepted and received by the defendant, executed and delivered to the plaintiff an insurance policy by the term of which policy the defendant agreed to insure, and did insure, the school buildings owned by the plaintiff School District, for a period of one year from the 24th day of October, 1925, to the 24th day of October, 1926, against all damages, caused by fire, lightening [lightning], windstorms, cyclones and tornadoes in the sum of Twenty-Two Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents ($22,333.33) and did agree to insure and did insure, the fixtures and furniture in said building for the sum of One Thousand One Hundred Thirty-Three Dollars and Thirty-Three Cents ($1133.33) making a total of the sum of Twenty-Three Thousand, Four Hundred Sixty-Six Dollars, and Sixty-Six Cents ($23,466.66). Plaintiff alleges that plaintie is unable to attach a copy of said insurance policy to this petition for the reason that said insurance policy was completely destroyed in the fire hereinafter mentioned, but alleges that said policy was the standard form of policy prescribed by Section 6767 of the Compiled Statutes of Oklahoma.

[fol. 4] 4. That on or about the 2nd day of January, 1926, said school building was completely destroyed by fire and was so damages [damaged], wrecked and destroyed as to render said building wholly unsafe and unfit for use. That the reasonable value of said building at the time of such loss was the sum of $80,000.00, which was a total loss to the plaintiff, except that the salvage from said building was of the value of $200.00. That all of the woodwork in said building was completely destroyed and the brick walls and foundation were so badly burned and damaged that they were worthless and dangerous, and the Fire Marshall [Marshal] of the State of Oklahoma ordered said walls to be town [torn] down; and in compliance with said order, said walls were torn down and removed at great expense to the plaintiff District.

5. That within a few days after said fire occurred the plaintiff notified the Agents of the defendant Insurance Company that said loss had occurred [occurred] and the defendant sent its adjuster to adjust said loss, but said adjustor refused to allow the plaintiff an adequate amount for the loss which it had sustained by said fire, and the defendant Company refused to rebuild or to replace said school building and has failed and refused to pay to the plaintiff the loss which it has sustained on account of said fire.

6. Plaintiff alleges that the plaintiff has performed all the conditions of said policy on its part. That the defendant has not paid the said loss nor any part thereof.

Wherefore, plaintiff prays for judgment against the defendant for the sum of Twenty-Three Thousand Four Hundred Sixty-Six Dollars and Sixty-Six Cents ($23,466.66) with interest thereon at the rate of six per cent (6%) per annum from the 2nd day of January, 1926, and the cost of this action, and for such other and further relief as the plaintiff may be entitled to under the facts set forth above.

Lowry Law Offices, by Chester H. Lowry and R. J. Shive, Attorneys for the Plaintiff.

[File endorsement omitted.]

In District Court of Payne County

Petition for Removal—Filed Nov. 26, 1926

Your petitioner, Concordia Fire Insurance Company of Milwaukee, Wisconsin, sued herein as Concordia Insurance Company of Milwaukee, defendant in the above entitled ac-[fol. 5] tion, appearing by Ross & Thurman, its attorneys, respectfully shows:

I

That said action is a suit of a civil nature at law, of which the District Court of the United States has original jurisdiction, and has been brought and is now pending in this Court, and has not yet been tried; nor has the time

in which the defendant, your petitioner, is required by the laws of the State of Oklahoma, or by the rule or rules of this Court, to answer or plead to the petition elapsed; and that the matter and amount in dispute in said suit exceed, exclusive of interest and costs, the sum or value of three thousand dollars.

II

Your petitioner further states that in said suit there is a controversy which is between citizens of different states, and which can be fully determined between them, to-wit: A controversy between the plaintiff, who, at the time of the commencement of said suit, was, and is now, a citizen and resident of the State of Oklahoma, and this defendant, who is not a citizen of the State of Oklahoma but was at the time of the commencement of said action, and now is, a corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, and a citizen and resident thereof, and that there are no other parties to said suit.

III

That by reason of the premises your petitioner desires and is entitled to have said suit removed from the District Court of the Eleventh Judicial District of the State of Oklahoma in and for Payne County, State of Oklahoma, into the next District Court of the United States for the Western District of the State of Oklahoma.

IV

Your petitioner offers herewith a bond with good and sufficient surety, for its entry into the District Court of the United States for the Western District of Oklahoma, within thirty days from the filing of this petition, of a certified copy of the record of this suit, and for paying all costs that may be awarded by said District Court of the United States for the Western District of Oklahoma, if said court should hold that said suit was wrongfully or improperly removed.

And your petitioner prays this Court to proceed no fur- [fol. 6] ther herein, except to make an order of removal and to accept said security and bond, and to cause the

record herein to be removed to the District Court of the United States for the Western District of Oklahoma.

Concordia Fire Insurance Company of Milwaukee, Wisconsin, by Ross & Thurman, Its Attorneys.

Duly sworn to by H. C. Thurman. Jurat omitted in printing.

[File endorsement omitted.]

In District Court of Payne County

Notice of Removal—Filed Nov. 26, 1926

To School District No. 98 of Payne County, Oklahoma, and Lowry Law Offices, Chester H. Lowry and R. J. Shive, its attorneys:

You and each of you, are hereby notified that the defendant, Concordia Fire Insurance Company of Milwaukee, Wisconsin, will, on or before the 27 day of November, 1926, file in this Court its petition praying for an order removing said cause to the District Court of the United States for the Western District of Oklahoma, together with bond, as required by law, and that the said petition and bond will be presented to the Judge of said Court as soon thereafter [fol. 7] as counsel can be heard.

Dated this 24th day of November, 1926.

Ross & Thurman, Attorneys for Defendant.

Service of the foregoing notice and receipt of a copy thereof and a copy of defendant's petition for removal is hereby acknowledged by the plaintiff this 26 day of November, 1926, at 8:30 o'clock A. M.

Lowry Law Offices, Chester H. Lowry and R. J. Shive, by R. J. Shive, Attorneys for Plaintiff.

[File endorsement omitted.]

(Bond on removal in the sum of $500, with Concordia Insurance company of Milwaukee as principal and Fidelity

& Deposit company of Maryland as surety, was given on the 24th day of November, A. D. 1926, and on the 29th day of November, A. D. 1926, said bond was approved by the district judge of the state court.)

In District Court of Payne County

Order of Removal—Filed Nov. 30, 1926

This cause coming on for hearing this 29" day of November, 1926, upon application of the defendant herein for an order removing this cause to the District Court of the United States for the Western District of the State of Oklahoma, and it appearing that the defendant has filed its petition for such removal in due form of law, that the defendant has filed a bond, duly conditioned, with good and sufficient surety, as provided by law, and that the defendant has given notice to the Plaintiff of the filing of said petition and bond, as required by law and it appearing to the Court that this is a proper cause for removal to the said District Court of the United States for the Western District, State of Oklahoma.

Now, therefore, this Court does hereby accept and approve said bond, and accepts such petition, and it is hereby ordered and adjudged that this cause be, and the same is hereby removed to the District Court of the United States for the Western District, State of Oklahoma; and the Clerk of this Court is hereby directed to prepare the rec- [fol. 8] ord in this case for transmittal to the said Court forthwith; and that all other proceedings in this Court be stayed.

Done in open court this 29" day of November, 1926.

Charles C. Smith, District Judge of the Eleventh Judicial District of the State of Oklahoma.

[File endorsement omitted.]

Transcript of Record on Removal endorsed: Filed Dec. 23, 1926. Harry L. Finley, Clerk, by Edward H. Lewis, Deputy.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA

No. 3473

ANSWER—Filed Jan. 20, 1927

Comes now the defendant, Concordia Fire Insurance Company of Milwaukee, sued herein as Concordia Insurance Company of Milwaukee, and for answer to the plaintiff's petition alleges and states:

I

The defendant denies all of the allegations of said petition except such as are hereinafter specifically admitted.

II

The defendant admits that it is a foreign corporation and is duly licensed and authorized to transact an insurance business within the State of Oklahoma.

III

The defendant specifically denies that on October 24th, 1925, or at any other time it entered into, issued or delivered a policy of insurance such as is alleged in the plaintiff's petition, but admits that on or about October 24th, 1925, it did issue and deliver to the plaintiff its Policy No. 18814, which was written upon the Standard form of policy prescribed by Section 6767 C. O. S. 1921, as alleged in plaintiff's petition; but states that the insuring clause in said policy provides:

"The Concordia Fire Insurance of Milwaukee, in consideration of the stipulations herein named and of $310.43 [fol. 9] does insure School District No. 98 Payne County, Oklahoma, for the term of one year from the 24th day of October, 1924, at noon, to the 24th day of October, 1925, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding $25,000.00, to the following described property while located and contained as described herein, and not elsewhere, to-

wit: This policy being for $25,000.00 covers its pro rata proportion of each of the following amounts:

$67,000.00	On the three story, composition tile roof brick school building located NE Corner of NE/4 Section 1, Township 18, Range 5, Payne County, Oklahoma.
3,400.00	On furniture and fixtures of every description while contained in the above described building.
2,500.00	On frame, shingle roof, Teacherage on above premises.
300.00	On furniture and fixtures while in Teacherage.
300.00	On frame shingle roof garage in rear of Teacherage.
1,000.00	On brick building used as power plant on above premises.
500.00	On machinery in power plant.
$75,000.00	Total''

That it was the meaning and intention of the parties and the said insuring clause provides that the defendant was undertaking to insure the plaintiff to the extent of one-third the amount of the loss or damage by fire to the said brick school building not exceeding the sum of one third of $67,000.00, and was insuring the plaintiff against one-third of the loss or damage to the furniture in said building, not exceeding the sum of one-third of $3400.00.

IV

Defendant further alleges and states that on or about October 24th, 1925, the plaintiff procured and there was delivered to it the following policies of insurance by the companies named, and that said policies covered the same period of time as the policy issued by this defendant, to-wit: Policy No. 550398, issued by the Fire Association of Philadelphia for the sum of $250,000.00, with the same provisions and covering the same items of property in the same amounts as the policy issued by this defendant; Policy No. 825378, issued by National Fire Insurance Company of Hartford for $8500.00, insuring the plaintiff against loss

[fol. 10] or damage to said brick school building and the contents thereof, in the sum of $8500.00; Policy No. 9-C-1, issued by Royal Insurance Company of Liverpool, England, insuring the plaintiff against loss or damage to said brick school building, in the sum of $16,500.00.

Wherefore,, premises considered, defendant prays that the plaintiff take nothing by reason of this action and this defendant have judgment against the plaintiff for its costs herein expended.

Ross & Thurman, Attorneys for Defendant.

Duly sworn to by H. C. Thurman. Jurat omitted in printing.

[File endorsement omitted.]

In United States District Court

No. 3473. Law

Motion to Require Defendant to Make Answer More Definite and Certain—Filed Feb. 5, 1927

Comes now the plaintiff above named and moves the Court that the defendant be required to make its answer more definite and certain in the following respects, towit:

Plaintiff shows to the Court that the defendant in paragraph three of its answer, as filed on the 20th day of Janu-[fol. 11] ary, 1927, attempts to plead and set forth a portion of a certain written policy of Insurance which the said defendant admits it made, executed and delivered to the plaintiff herein. Plaintiff further shows to the Court that under the pleadings in said cause and in accordance with the allegations of the petition of the plaintiff, the original Policy of Insurance, as issued and delivered to the plaintiff, was destroyed by fire and that plaintiff does not have in its possession or under its control any copy of said Policy of Insurance but that the defendant has in its possession and under its control a copy of said Policy of Insurance, the same being a written contract of Insurance as between the plaintiff and defendant.

Plaintiff asks that the defendant be required to make its answer more definite and certain by attaching to said answer a full, true and correct copy of the written contract or Policy of Insurance as made, executed and delivered by the defendant to the said plaintiff.

Lowry Law Offices, by Chester H. Lowry, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

(Case No. 3473)

Order, March 8, 1927, Overruling Motion to Make More Definite and Certain

(Before Judge Cotteral)

On this 8th day of March, 1927, the plaintiff appears by Messrs. Embry, Johnson & Tolbert, its attorneys, and the defendant by Messrs. Ross & Thurman, its attorneys. Thereupon, motion to make answer definite and certain herein comes on for hearing, and upon consideration thereof, it is ordered by the Court that said motion be and the same is overruled and exceptions allowed the plaintiff.

In United States District Court

No. 3473. Law

First Amended Petition—Filed Aug. 18, 1927

Comes now the plaintiff above named and for cause of action against the defendant alleges and states:

I

That the plaintiff is a School District duly organized under the laws of the State of Oklahoma and is authorized to [fol. 12] sue and be sued and to do business in its corpo-

rate name of School District No. 98 of Payne County, Oklahoma. The officers of the School Board of said School District No. 98 being G. P. Brooks, Director, V. I. Langston, Clerk, and J. E. Quigley, member, and this action being authorized and filed by direction of said School Board, said School Board having been duly authorized to prosecute this action at the last regular meeting of the legal voters of said School District.

II

That the defendant is a foreign corporation engaged in the insurance business and duly licensed and authorized to do business in the State of Oklahoma.

III

That on the 24th day of October, 1925, the defendant, for a valuable consideration in money, which has been accepted and received by the defendant, executed and delivered to the plaintiff an insurance policy by the terms of which policy the defendant agreed to insure and did insure the school building owned by the plaintiff School District on the Northeast Quarter of Section One, Township 18 North, Range 5 East, Payne County, Oklahoma, for a period of one year from the 24th day of October, 1925 to the 24th day of October, 1926 against all damage caused by fire, lightning, windstorms, cyclones and tornadoes in the sum of $22,333.33 and did agree to insure and did insure the furniture and fixtures in said building, also owned by the plaintiff, for the sum of $1133.33, making a total of the sum of $23,466.66. Plaintiff further alleges it is unable to attach a copy of said policy to this petition for the reason that the same was completely destroyed in the fire herein mentioned, but alleges that said policy was the standard form of policy prescribed by the statutes of Oklahoma. That said building was located as stated above and said furniture and fixtures were in said building at the time of said fire.

IV

Plaintiff further alleges that on the 2nd day of January, 1926, said school building was completely destroyed by

fire and was damaged, wrecked and destroyed so as to render same wholly unsafe and unfit for use; that the reasonable market value of said building at the time of such loss was the sum of $75,000.00, which was a total loss to plaintiff except the salvage from said building which was of the value of $200.00. That all of the woodwork in said building was completely destroyed and the brick walls and founda-
[fol. 13] tion were so badly burned and damaged that they were worthless and dangerous and the Fire Marshal of the State of Oklahoma ordered said walls to be torn down and in compliance with said order said walls were torn down and removed at great expense to the plaintiff District. Plaintiff also states that at the same time and place all of said furniture and fixtures in said building and likewise described in said policy were totally destroyed by said fire and the same were then of a reasonable market value of more than $3400.00.

V

Plaintiff further states that at the same time this defendant executed and delivered its policy of insurance mentioned herein, to-wit on the 24th day of October, 1925, there were also executed and delivered to the plaintiff the following policies of insurance by the companies named, and said policies cover the same period of time as the policy issued by this defendant, to-wit:

Policy No. 825378 issued by The National Fire Insurance Company for the sum of $8500.00 with the same provisions and covering the property above mentioned;

Policy No. 5503998 issued by the Fire Association of Philadelphia for the sum of $25,000.00 with the same provisions and covering the property above mentioned;

Policy No. 9-C-1 issued by Royal Insurance Company of Liverpool, England, insuring the plaintiff against loss or damage to the building herein mentioned, in the sum of $16,500.00.

Plaintiff further alleges that at the time of the execution and delivery of said policies and at the time of the said fire, to-wit the 24th day of October, 1925 and 2nd day of January, 1926, respectively, W. A. Northgrave of Yale, Oklahoma, was the duly-authorized local agent of said Royal Insurance Company and had the negotiations with the plaintiff lead-

ing to the delivery of its said policy to plaintiff; that A. E. Sloan of Yale, Oklahoma, was at said times the duly authorized local agent of said National Fire Insurance Company and the said Fire Association of Philadelphia and had the negotiations with said plaintiff leading to the execution and delivery of the separate policies of said companies, and Charles Morris of Yale, Oklahoma, was the duly authorized local agent of Concordia Insurance Company and had negotiations with plaintiff leading to the execution and delivery of the policy of that Company. That on said 2nd day of January, 1926, and within two or three hours after said fire had so destroyed said building and the furniture and [fol. 14] fixtures therein aforesaid, the plaintiff notified the said W. A. Northgrave and said A. E. Sloan and said Charles Morris of the said fire and of the extent of the damage and destruction thereof, with the request that said agents notify their said respective companies for which they were agents; that within two or three days thereafter the said Royal Insurance Company selected and appointed Guy Fuller, of Fuller Adjustment Company, as its duly authorized agent to investigate the said fire and make estimates as to the value of the property destroyed and settle for said loss; at the same time said National Fire Insurance Company and said Fire Association of Philadelphia appointed said Guy Fuller or Fuller Adjustment Company and —— Klein as their duly appointed agents to investigate said fire and make estimates as to the value of the property destroyed and settle for said loss, and at the same time said Concordia Insurance Company appointed Lloyd J. Mullen as its duly authorized agent to investigate said fire and make estimates as to the value of the property destroyed and settle for said loss. That said adjusters for said companies visited the scene of said fire and made examinations as to the value of the property destroyed and the circumstances surrounding said fire and had plaintiff to furnish them, said adjusters, with the items of said property so destroyed and the plans and specifications of the building, all of which was furnished by said plaintiff at the request of said adjusters as aforesaid, and said plaintiff was requested to and did furnish such assistance in this regard as it could to Mr. Frank Kebelman, who was the building contractor selected and appointed by said companies and their adjusters to make the estimate of such value of the property

so destroyed and to obtain the correct information as to the condition of the property at the time of said loss as more fully appears by the letter from Fuller Adjustment Company dated February 3rd, 1926, copy of which is attached hereto and made a part hereof as Exhibit "A". Plaintiff further states that thereafter on the 27th day of February, 1926, which was on the fifty-sixth day after said fire, said adjusters, to-wit Guy Fuller, Lloyd J. Mullen and Mr. Klein, met with the Board of said plaintiff, to-wit J. E. Quigley, G. D. Brooks and V. I. Langston, who were then said Board of said school, which meeting was held at Yale, Oklahoma, at the scene of said fire; that there was also present at said meeting said Mr. Frank Kebelman, which meeting was held for the purpose of discussing the settlement and adjustment of said loss of plaintiff from said fire. That thereupon all of said insurance companies, acting through their said ad- [fol. 15] justers and agents, as aforesaid, at said meeting stated to the plaintiff, through its said Board, that they had made full and complete investigation as to said fire and the market value of the building and furniture and fixtures therein so destroyed by said fire and had obtained all and the correct information thereon and that there was no question as to the loss upon said furniture and fixtures in said sum of $3400.00 and that said insurance companies were then and there ready to pay said plaintiff that sum for its loss upon said furniture and fixtures, such payment to be pro rated among said insurance companies, stating at the same time that said furniture and fixtures were under valued for said insurance and were of a fair market value in excess of said sum of $3400.00. The said companies through their said adjusters and agents aforesaid at the same time stated that said building was over valued and could be replaced for the sum of approximately $53,000.00, and then said companies, through their said agents offered the plaintiff the sum of approximately $56,000.00 as full payment for all of the loss to both said building and furniture and fixtures therein so destroyed by fire as aforesaid, payments to be pro rated among all of said insurance companies. The plaintiff declined to accept said amount and requested said insurance companies through their said adjusters to replace said building, inasmuch as said insurance companies contended that the same could be replaced for about $53,000.00 and had said Kebelman present with his

figures to show that same could be replaced for about said amount. This, however, said insurance companies refused to do. Plaintiff further states that all of said property so destroyed by fire was destroyed at the same fire and all of the facts and circumstances relating to said furniture and fixtures also existed as to said building and said plaintiff had only given said insurance companies the same notice in the one instance as in the other, and said companies at said meeting offered to pay the full amount of the insurance on said furniture and fixtures as the same was undervalued, and the only question as to the said building was as to the value thereof and the replacement value, which said insurance companies contended was about $53,000.00 and which the plaintiff, through its Board, contended was of the value of $75,000.00; that the attention of said plaintiff and its Board was directed only as to the value of said building and the replacement value thereof and was the only matter discussed and as to which there was any disagreement at said meeting. That there was no objection made at any time that proofs of loss had not been furnished by the plaintiff and [fol. 16] there was no request for the same; that said insurance companies at said meeting by their said conduct in offering to pay the full amount of said insurance upon the furniture and fixtures, stating that the same was of a greater value than $3400.00 at the time of the loss and their said acts and conduct in offering to pay the sum of $53,000 in payment of the loss of said building, stating and contending that said building was only of the value of about $53,000.00 at said time and could be replaced for said sum of about $53,000.00, thereby led the plaintiff to believe that the only matter in dispute between said plaintiff and said insurance companies was the market and replacement value of said building, the insurance companies contending on one hand that the market and replacement value was the sum of $53,000.00 and the said plaintiff contending that the same was $75,000.00 and this said defendant, together with the other insurance companies mentioned, has now, by reason of the facts aforesaid, waived the furnishing of proof of loss in strict accordance with the provis-ons of said policy and is estopped to set up and claim such failure as against the plaintiff in any particular. That said insurance companies through the examinations and efforts of their said adjusters

and through the assistance of said Board rendered at the request of said adjusters, obtained all of the information which could have been obtained had proof of loss been furnished in strict conformity to the policies of insurance and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss and that no other or further proof or information as to said loss was required but was waived.

VI

Plaintiff further states that said defendant has failed and refused to pay anything on account of said loss although the same is due and payable.

VII

Plaintiff alleges that it has performed all of the other conditions of said policy to be performed on its part, except the furnishing of said proof of loss which has been waived on the part of said defendant and as to which it is now estopped to set up such failure to the prejudice of any right of said plaintiff.

Wherefore plaintiff prays for judgment against the defendant for the sum of $23,466.66 with interest thereon at the rate of six per cent per annum from the 2nd day of [fol. 17] January, 1926, and the costs of this action and for such other and further relief as may seem proper to the Court.

Rainey, Flynn, Green & Anderson, Lowry Law offices,
Attorneys for Plaintiff.

Exhibit "A" to First Amended Petition

Oklahoma City, Oklahoma, February 3rd, 1926.

Mr. V. Langston, Yale, Oklahoma.

Dear Sir: I have your favor of the 30th ultimo and also specifications for the addition to the school building which was constructed in 1922.

We are passing these on to Mr. Frank Kebelman, who is to make the estimate for the interested Companies, and he

will no doubt be in Yale this week. Any assistance you may give him in arriving at the correct information as to the condition of the property at the time of the loss will be appreciated.

Thanking you, I am

Yours very truly, Fuller Adjustment Company, by Guy H. Fuller. Guy H. Fuller.

GHF/M.

[File endorsement omitted.]

In United States District Court

No. 3473. Law

Demurrer to First Amended Petition—Filed Sept. 3, 1927.

Comes now the defendant and demurs to the first amended petition filed herein and for ground of objection shows the court that the plaintiff in its first amended petition fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

Wherefore, defendant prays judgment in favor of the defendant for its costs herein expended.

Ross & Thurman, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 18] In United States District Court

(Case No. 3473)

Order, November 25, 1927, Overruling Demurrer

(Before Judge Cotteral)

On this 25th day of November, 1927, the defendant appears by Messrs. Ross & Thurman, its attorneys, and it is thereupon ordered by the Court that demurrer to the first amended petition herein be and the same is overruled and exceptions allowed the defendant.

IN UNITED STATES DISTRICT COURT

No. 3473. Law

ANSWER TO PLAINTIFF'S FIRST AMENDED PETITION—
Filed Dec. 3, 1927

Comes now defendant, Concordia Insurance Company, by its attorneys, Ross & Thurman, and for its answer to plaintiff's first amended petition, alleges and states:

I

Defendant denies each and every allegation in said amended petition contained except such as are hereinafter specifically admitted.

II

Defendant admits that it is now and was at all times stated in the amended petition, a corporation, as alleged therein and admits that under date of October 24th, 1925, it executed and delivered to the plaintiff a policy of fire insurance insuring the school building of the plaintiff for a period of one year, as alleged, in the sum of $22,333.33 and did agree to insure the furniture and fixtures in said building also owned by the plaintiff for the sum of $1,133.33, and that said policy was the standard form of fire insurance policy prescribed by the statutes of the State of Oklahoma. Defendant further admits that there were other policies of insurance covering said property in the amounts and in the companies alleged in paragraph V of said amended petition.

III

Further answering, this defendant states that said standard form of fire insurance policy upon which plaintiff brings this action contains the following valid and binding provision:

"If fire occur the insured * * * within sixty days after the fire, unless such time is extended in writing by the company, shall render a statement to this company signed and [fol. 19] sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the

property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged;"

And that said standard form of policy also contains the following valid and binding provision:

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written herein or attached or appended hereto. Liability for re-insurance shall be specifically agreed hereon."

And said form of policy also contains the following valid and binding provision:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

[fol. 20] And that said policy also contains the following valid and binding provision:

"This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

And defendant states that the plaintiff has wholly failed to render to defendant said statement, signed and sworn to by plaintiff as provided for in said policy under the provision relating thereto above quoted; and that said provision and requirement of said policy has never been waived by defendant in any manner whatsoever. That by reason of said facts, the plaintiff is not entitled to maintain this action and this action was pre-maturely brought by plaintiff.

IV

For further answer, defendant states that no petition was ever filed by plaintiff against defendant and no action commenced by plaintiff against the defendant in which a petition was filed by plaintiff stating any cause of action whatever against defendant, within twelve months next after the fire complained of by plaintiff. That by reason of said facts, any cause of action which the plaintiff had or might have had against the defendant upon or under said policy of insurance, is barred by the statute of limitations and the limitation provided in said policy of insurance which is the standard statutory form of fire insurance policy as required and provided for by the Compiled Statutes of Oklahoma of 1921, Section 6767 thereof.

[fol. 21] V

Defendant further states that by reason of said last above quoted provision of said policy of insurance, no officer, agent, or representatve of defendant had power to waive any provision or condition of said policy of interest herein, and that no waiver of any of the provisions of said policy of interest herein was ever written upon or attached to said policy. That none of the provisions of said policy of insurance involved herein or in any wise of interest herein were ever waived by defendant.

VI

Defendant further states that if it be liable to the plaintiff in any sum whatsoever in this action, which defendant denies, then and in that event, the liability of this defendant is limited by the provision of said policy above quoted relating thereto, to such proportion of any loss on the property, and each item thereof, for loss or damage to which plaintiff has brought this action, as the amount of insurance under said policy covering upon said property, and each item thereof, bears to the whole insurance upon said property, and each item thereof. That upon said building and permanent fixtures constituting a part of said building, in such event, the defendant could only be held for such proportion of any loss thereon or damage thereto as $22,333.33 bears to the sum of $67,000.00.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by this action, and that defendant have judgment for its costs, and such other relief as to the court may seem proper.

Ross & Thurman, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 22] In District Court of Payne County, State of Oklahoma

No. 8237

School District No. 98 of Payne County, State of Oklahoma, Plaintiff,

vs.

The Royal Insurance Company, Limited, a Corporation, Defendant

Petition—Filed Oct. 28, 1926

Comes now the plaintiff above named and for cause of action against the defendant alleges and states:

1. That the plaintiff is a School District duly organized under the laws of the State of Oklahoma and is authorized to sue and to be sued and to do business in its corporate name of School District No. 98 of Payne County, State of Oklahoma; the officers of the School Board of said District No. 98 being G. P. Brooks, Director; V. I. Langston, Clerk, and J. E. Quigley, Member; this action being authorized and filed by direction of said School Board and said School Board having been duly authorized to file this action at the last regular meeting of the legal voters of said School District.

2. That the defendant is a foreign corporation engaged in the insurance business and duly licensed and authorized to do business within the State of Oklahoma.

3. That on the 24th day of October, 1925, the defendant for a valuable consideration, towit: a premium of Two Hundred Thirty-Five and 12/100 ($235.12) Dollars which has been accepted and received by the defendant, executed and delivered to the plaintiff an Insurance Policy by the terms of which Policy the defendant agreed to insure and did insure the school buildings owned by the plaintiff School District for a period of one year from the 24th day of October, 1925, to the 24th day of October, 1926, against all damages caused by fire, lightening, [lightning], wind storms, cyclones and tornadoes in the total amount not ex-

ceeding the sum of Sixteen Thousand Five Hundred ($16,-500.00) Dollars. A true and correct copy of said Insurance Policy is attached hereto, marked Exhibit "A" and is hereby made a part of this petition, the same as if it were copied herein in full.

4. That on or about the 2nd day of January, 1926, said school building was completely destroyed by fire and was so damaged, wrecked and destroyed as to render said building wholly unsafe and unfit for use. That the reasonable value of said building at the time of such loss was the sum of $80,000.00, which was a total loss to the plaintiff except that the salvage from said building was of the value of $200.00. That all of the woodwork in said building was [fol. 23] completely destroyed and the brick walls and foundation were so badly burned and damaged that they were worthless and dangerous, and the Fire Marshal of the State of Oklahoma ordered said walls to be torn down and in compliance with said order said walls were torn down and removed at great expense to the Plaintiff District.

5. That within a few days after said fire occurred the plaintiff notified the Agents of the defendant Insurance Company that said loss had occurred and the defendant sent its adjuster to adjust said loss but said adjuster refused to allow the plaintiff an adequate amount for the loss which it had sustained by said fire, and the Defendant Company refused to rebuild or to replace said school building and has failed and refused to pay to the plaintiff the loss which it has sustained on account of said fire.

6. Plaintiff alleges that the plaintiff has performed all of the conditions of said policy on its part. That the defendant has not paid the said loss nor any part thereof.

Wherefore, plaintiff prays for judgment against the defendant for the sum of Sixteen Thousand Five Hundred ($16,500.00) Dollars with interest thereon at the rate of six per cent (6%) per annum from the 2nd day of January, 1926, and the cost of this action, and for such other and further relief as the plaintiff may be entitled to under the facts set forth above.

Lowry Law Offices, by Chester H. Lowry and R. J. Shive, Attorneys for Plaintiff.

EXHIBIT A TO PETITION

(Uniform Standard, Oklahoma)

Form No. 166 (Edition Apr. '25)

School Form

(For Use on Either Fire or Tornado Policies)

*1	$16,500.00	On the Three story Composition Tile roof Brick school building, including foundations, plumbing, electric wiring and stationary heating, lighting and ventilating apparatus and fixtures therein; also all permanent fixtures, including pipe organs, fixed seats, desks, railings, altars, clocks, bells and stained glass windows, belonging to and constituting a permanent part of said building; only while occupied for school purposes, with privilege of occasional public meetings, and situated N. E. Corner of N. E. Quarter Sec. One (1), Township Eighteen (18), Range Five (5) City, Town of Payne County, State of Oklahoma. This insurance shall also cover under this item, if the property of owner of building, door and window screens and storm doors and windows, belonging to above described building, while attached thereto or stored therein.
*2	$ Nil	On movable furniture and fixtures of every description, useful and ornamental; maps, library and supply of books and stationery; mirrors, pictures, paintings, engravings, including their frames, statuary and sculpture, all at not exceeding cost; laboratory supplies and equipment;

[fol. 24]

*No insurance attaches under any of the above items unless a certain amount is specified and inserted in blank immediately preceding the item.

scientific supplies and equipment; manual training machinery, supplies and equipment; gymnasium supplies and equipment; piano and other musical instruments (excluding organ with operating motor); stage scenery and equipment; movable heating apparatus, electrical apparatus, appliances and devices; fuel and provisions; and all other articles and apparatus as are usually contained in school buildings; all not belonging to and constituting a permanent part of the building and only while contained in the above described building.

*3 $ Nil On .....

Other insurance permitted; provided, however, if a Three-fourths Value Clause is attached to this policy, this permit is made subject to all the conditions of said Three-fourths Value Clause.

Alterations and Repairs Permit

(This clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in constructing additions or sheds which attach to and [fol. 25] communicate with such building, and the insurance, if any hereunder, on such building, is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of

---

* No insurance attaches under any of the above items unless a certain amount is specified and inserted in blank immediately preceding the item.

the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy, unless specifically included by endorsement attached hereto.

Permission granted to use electricity for light, heat and power in the premises described in this policy.

Caution.—See that the entire electrical equipment is installed and maintained in full compliance with the standard requirements of the National Electrical Code, copy of which may be obtained of your insurance agent.

Permission granted to use artificial or natural gas for fuel or light in the premises described in this policy, only when supplied through public service gas pipes, subject to the following conditions:

1. This company will not be liable for any damage by explosion of artificial or natural gas unless fire ensues, and then for damage by fire only, and under a fire policy only.

Note.—The term "premises," as used in this permit, means only the building (or buildings) described in this policy, or such portions of same as are occupied by the insured.

This policy does not cover on moving picture machine and films (unless specified herein).

The use of Moving Picture Machines is prohibited (under fire policies) unless special permit is endorsed hereon.

It is a condition of this insurance that attached awnings and radio equipment on the outside of the building are not covered when this form is attached to a tornado policy.

Gasoline Stove Permit

Subject to the following conditions, permission is granted to use gasoline stoves in the premises described in this policy.

The conditions of this permit, in so far as they are within control of the insured, are as follows:

[fol. 26] 1. That the filling, emptying, or opening of the reservoir of a gasoline stove shall be done by daylight or incandescent electric light only, and when the stove is not

in use; and that there shall be no other artificial light, and no fires or blaze in the room where and when such reservoir is being filled or emptied, or open.

2. That, unless otherwise permitted by endorsement hereon, no gasoline in excess of ten (10) gallons (which shall be kept in a tight and entirely closed metal can, free from leak), except that contained in the reservoir of a gasoline stove, shall be kept or used in the premises described in this policy.

3. The term "gasoline" shall be held to include naphtha, benzine, or any of the light products of petroleum, coal or tar, by whatever name known.

NOTE.—The term "premises," as used in this permit, means only the building (or buildings) described in this policy or such portions of same as are occupied by the insured.

NOTE.—The granting of the above permits does not waive any schedule charge therefor.

Lightning and Electrical Exemption or Dynamo Clauses

(These clauses void when attached to Tornado Policy)

Lightning Clause.—Except as provided in the Electrical Exemption or Dynamo Clause below, this policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not.

Electrical Exemption or Dynamo Clause.—If dynamos, exciters, lamps, motors, switches or other electrical appliances or devices are covered under this policy, this company shall not be liable for any electrical injury or disturb-

ance, whether from artificial or natural causes, unless fire ensues, and then only for such loss or damage to them as may be caused by such ensuing fire; this limitation to be operative notwithstanding any provision to the contrary in the lightning clause attached.

[fol. 27] Vacancy Condition

This policy continues in full force and effect during vacations between school terms, and at such times as school is not actually in session, provided that, if this form is attached to a fire policy and the building is abandoned for school purposes for an indefinite period without written permission hereon, then this policy shall be void.

Attached to and forming part of Policy No. G. C. 1 of the Royal Insurance Company of Liverpool issued at its Yale, Okla., Agency. Dated October 24, 1925.

Uniformity Trade Mark 166. 9-15-25.

W. A. Northgrave, Agent.

☞Important: Notice to Agents.—This form may be used on Fire or Tornado policies. Agents are cautioned, in either case, to atach to policy the Three-fourths Value Clause, the Exposure Clause, or Co-Insurance Clause, as called for in Book of Rules issued by the Oklahoma Inspection Bureau.

Uniform Standard, Oklahoma

Form No. 126 (Edition Dec. '24)

Moving Picture Machine Permit

(For temporary installations)

In consideration of $. Waived. extra premium, permission is granted to use a moving picture machine in the premises described in this policy for a period of 365 days, from October 24", 1925, at noon, to October 24", 1926, at noon, but said machine is not insured under this policy.

Attached to and forming part of Policy No. G. C. 1 of the Royal Insurance Company of Liverpool issued at its

Yale, Okla., Agency. Dated October 24", 1925. (Uniformity) 126 12-9-24.

W. A. Northgrave, Agent.

NOTE.—In all cases where machine is used regularly, specific rate must be applied for.

Uniform Standard, Oklahoma

Form No. 95

Hail Clause

(This clause must not be attached to a fire policy)

In consideration of $13.20 extra premium, it is a condition of this insurance that this Policy shall cover any [fol. 28] direct loss or damage to the property described herein, caused by Hail, whether accompanied by wind or not; provided, however, that if there shall be any other tornado insurance on said property, this Company shall be liable only pro rata with such other tornado insurance for any direct loss or damage caused by Hail, whether such other tornado insurance covers direct loss or damage caused by Hail or not. It is a further condition of this insurance that this Company shall not be liable for loss or damage caused by Hail to hay, grain or straw, in fields or in stacks.

Attached to and forming part of Policy No. G. C. 1 of the Royal Insurance Company of Liverpool issued at its Yale, Okla., Agency. Dated October 24", 1925.

Uniformity Trade Mark.

W. A. Northgrave, Agent.

To Agents:

For information as to premium charges under this clause refer to Book of Rules issued by the Oklahoma Inspection Bureau.

Uniform Standard, Oklahoma

Form No. 76 (Edition Jan., '25)

Gas Permit No. 2

Artificial or Natural (with Explosion Hazard)

Permission granted to use artificial or natural gas for fuel or light in the premises described in this policy, only

when supplied through Public Service gas pipes; and in consideration of $10.00 extra premium, this policy shall cover loss or damage to the property described herein, cause by explosion therein of artificial or natural gas when, and only when, used or supplied for fuel or lighting purposes, whether fire ensues or not, provided, that for the purpose of contribution all other insurance on the property described in this policy shall be treated as covering the hazard of explosion in like manner with this company, and it is a condition of this insurance that this company shall be liable for only such proportion of said loss or damage as the amount hereby insured bears to the whole amount if fire insurance and or explosion insurance on said property.

NOTE.—The term "premises" as used in this permit, means only the building (or buildings) described in this policy.

Attached to and forming part of Policy No. G. C. 1 of the [fol. 29] Royal Insurance Company of Liverpool issued at its Yale, Okla., Agency. Dated October 24", 1925.

Uniformity Trade Mark. 76 1-27-25.

W. A. Northgrave, Agent.

NOTE.—The attachment of this permit does not waive any schedule charge therefor.

General Combined Fire and Windstorm Policy No. G. C. 1.

Royal Insurance Company, Limited, of Liverpool

A Stock Corporation. Incorporated A. D. 1845

Fire and Lightning: Amount, $16,500. Rate, 1.25. Premium, $216.25.

Tornadoes, Cyclones, Windstorms: Amount, $16,500. Rate, .33. Premium, $54.45.

Total Premium, $270.70.

In consideration of the terms and stipulations herein named and of the total premium above stated,

Does insure School District #98, Payne Co., Okla., for the term of One year [year] from the 24" day of October, 1925, at noon, to the 24" day of October, 1926, at noon against all direct loss or damage by Fire, Lightning, Windstorms, Cyclones or Tornadoes, except as hereinbefore provided,

To an amount not exceeding, as to each hazard insured against, the separate sum stated above, as applicable to each such hazard, to the following described property while located and contained as described herein, and not elsewhere, towit:

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions no officer, agent, [fol. 30] representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents at Atlanta, Georgia, but this policy shall not be valid until countersigned by the duly authorized agent of the Company, at Yale, Okla.

Royal Insurance Company, Limited, by their Attorney, Milton Dargan, Manager for Southern Department.

Countersigned at Yale, Okla., this 24" day of October, 1925.

W. A. Northgrave, Agent. G. C. 5376.

3—278

Receipt for Partial-loss Payment

$—. Received of The Royal Insurance Company, Limited, of Liverpool, through —— ——, Agent, the sum of —— Dollars, being in full and accord, compromise and satisfaction, of all claims for loss and damage by Fire, Windstorm, which occurred on the — day of ——, 19—, to the property insured under this Policy, issued at its —— Agency, in consideration of which the amount insured thereunder is hereby reduced in the above mentioned Sum, leaving the amount now insured under this policy the Sum of —— Dollars, to wit:

Under 1st Item, $—.
" 2nd " $—.
" 3rd " $—.
" 4th " $—.

—— ——, the Assured by said Policy.

This Receipt to be signed by Claimant.

[fol. 31] Receipt for Cancellation

	Year	Month	Day
Date of Cancellation			
" Policy			
Time in force			

Premium Paid	$—
" Earned at *— Rate	$—
" Returned Assured	$—

* Short Rate or Pro Rata.

$—.

—— —, 19—.

Received of the Royal Insurance Company, Limited, of Liverpool, England, —/— Dollars, Return premium, in consideration of which this Policy is hereby cancelled and surrendered to said Company.

—— ——, Assured.

If cancelled Pro Rate please state Why Policy is cancelled.

(Endorsed on back)

General Combined Fire and Windstorm Policy.

Expires October 24" 1926. Property School Building. Am't $16,500. Premium $235.12. Assured School Dis. #98, Payne Co.

No. G. C. 1.

Royal Insurance Company, Limited, Southern Department, Atlanta, Ga.

Milton Dargan, Manager; F. M. Mikell, Assistant Manager; W. O. Slaughter, Assistant Manager; Geo. P. Street, Agency Superintendent.

W. A. Northgrave, Agent.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

[fol. 32] This Policy is not transferable or assignable for purposes of collateral security, but in all such cases it is to be ~~made~~ "Payable in case of loss," etc., by endorsement on its face. In case of actual sale and transfer of title, the form subjoined may be used, which must be executed and approved at the time of said transfer.

—— —, 19—.

For Value Received, — hereby transfer all — right, title and interest in the within Policy to —— ——, of ——.

—— ——.

Entered and approved —— —, 19—. —— ——, Agent.

Stipulations and Conditions Forming Part of This Policy

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this com-

pany is liable, pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or [fol. 33] fase swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or

possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerin or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or [fol. 34] commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities, nor unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed

by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the prorata premium.

[fol. 35] If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that

the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in the new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the [fol. 36] claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examination under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and

other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon. [fol. 37] If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

Provisions and Conditions Especially Applicable to Tornadoes, Windstorms and Cyclones

Except as limited or changed by the conditions herein provided as especially applicable to windstorms, cyclones and/or tornadoes, wherever in this policy the word "Fire" occurs, it shall be held to include and mean "Tornado, Windstorm and/or Cyclone."

This Company shall not be liable for any loss or damage caused by hail, whether driven by wind or not (unless liability therefor is assumed by specific endorsement hereon), snowstorm or blizzards, frost or cold weather; nor for any loss or damage to grain, hay or straw in stacks; nor for loss or damage to windmills, wind-pumps or their towers, whether blown down or not; nor for loss or damage to other property caused by the blowing down of windmills, wind-pumps or their towers, unless such other property also sustains other loss or damage caused by wind; nor for loss or damage to metal smokestacks (unless specifically insured), awnings, signs, temporary or board roof additions, nor (unless liability therefor is specifically insured under what is known as "Builders' Risks"), for the loss or damage to buildings (or their contents) in process of construction or [fol. 38] reconstruction, unless same are entirely enclosed and under roof, with all outside doors and windows permanently in place; nor for loss or damage occasioned directly or indirectly by or through any tidal wave, high

water, overflow, or cloudburst; nor for consequential loss or damage of any kind.

This Company shall not be liable for any loss or damage caused by water or rain, whether driven by wind or not, unless the building insured, or containing the property insured, shall first sustain an actual damage to the roof or walls of the same caused by the direct force of the wind, and shall then be liable only for such damage to the interior of the building or the insured property therein, as may be caused by water or rain entering the building through openings in the roof or walls made by the direct action of the wind.

It is expressly stipulated that only such proportion of the insurance under this policy on any building covers on plate, stained, leaded or cathedral glass therein, as the value of such glass shall bear to the value of said building and to such extent only shall this Company contribute with other insurance in payment of any loss thereon; and plate glass, accident or casualty insurance shall be deemed other insurance and treated as contributing.

The conditions elsewhere in this policy relating to encumbrance, change in occupancy, artificial lighting, and keeping explosives and inflammable oils shall not apply to Tornado, Windstorm and/or Cyclone insurance granted hereunder.

In case of fire occurring subsequent to any loss or damage by tornado, windstorm or cyclone, this Company shall be liable under the Tornado, Cyclone or Windstorm provision (or cover) of this policy only for such loss or damage as occurred previous to said loss or damage by fire and for no loss by fire whatever under the Tornado, Windstorm or Cyclone provisions (or cover) of this policy.

Yale, Okla. 24" October, 25.

[File endorsement omitted.]

In District Court of Payne County

No. 8237

Special Appearance Motion—Filed Nov. 22, 1926

Now comes the defendant, Royal Insurance Company, Limited, a corporation, by its attorneys, Rittenhouse & Rittenhouse, and appearing specially and for the purpose of [fol. 39] this motion only, moves the court to quash, set

aside and held [hold] for naught the purported issuance, service and return of summons in the above entitled and numbered cause for the reason that the same was not issued, served and returned in the manner required by law.

Rittenhouse & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

IN DISTRICT COURT OF PAYNE COUNTY

No. 8237

PETITION FOR REMOVAL OF CAUSE TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA—Filed Nov. 22, 1926

To the Honorable District Court of Payne County, Oklahoma:

Your petitioner, Royal Insurance Company, Ltd., a corporation, respectfully shows that it is the defendant in the above entitled and numbered action, and that the matter and amount involved and in controversy in said cause exceeds, exclusive of interest and costs the sum or value of $3,000.00.

Your petitioner further shows that said suit is of a civil nature and that in said suit, there is a controversy which is wholly between citizens of different states, to-wit: between School District No. 98 of Payne County, Oklahoma, a municipal corporation, as plaintiff and your petitioner as defendant; that the said plaintiff at the date of the commencement of this action was and still is a municipal corporation organized and existing under the laws of the State of Oklahoma, and your petitioner, Royal Insurance Company, Ltd., the defendant herein, at the date of the commencement of said suit was and still is a corporation organized and existing under and by virtue of the laws of England, and it was and still is an alien citizen of the United States and a resident of the country of England, and a non-citizen and non-resident of the State of Oklahoma. That the defendant, Royal Insurance Company, Ltd., has merely been admitted and licensed to do business in the State of Oklahoma as a foreign corporation in accordance with the laws of the State of Oklahoma admitting and licensing foreign corporations to do business in said state.

Your petitioner further shows that said action is a suit at law by the plaintiff for the purpose of recovering of and from the defendant a money judgment in the principal sum of $16,500.00 and costs.

[fol. 40] Your petitioner further shows that by the terms and provisions of the summons served upon it herein and under the laws of the State of Oklahoma governing, it is not required to plead in this cause until the 28th day of November, 1926.

Your petitioner offers herewith a bond with good and sufficient surety in the penal sum of $500.00, conditioned for its entering in the District Court of the United States for the Western District of Oklahoma, within thirty days from the date of filing of his petition, a certified copy of the record in this action, and for paying all costs that may be awarded by said District Court of the United States if said court should hold that this action was wrongfully or improperly removed thereto.

Your petitioner, therefore, prays that this Honorable Court will make an order removing this cause to the District Court of the United States for the Western District of Oklahoma, and that this Honorable Court will proceed no further herein except to make said order of removal and to accept the said surety and bond, and to cause a duly certified copy of the record herein to be made for transmission to and filing in the District Court of the United States for the Western District of Oklahoma.

Rittenhouse & Rittenhouse, Attorneys for Defendant.

Duly sworn to by John F. Webster. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 41] In District Court of Payne County

No. 8237

Notice of Removal—Filed Nov. 22, 1926

To the Plaintiff, School District No. 98 of Payne County, State of Oklahoma, and its attorneys of record, Chester H. Lowry and R. J. Shive:

Please take notice that on the 22 day of Nov. 1926, the Royal Insurance Company, Ltd., a corporation, defendant

in the above entitled and numbered cause, will file in the District Court of Payne County, Oklahoma, its petition and bond for the removal of the above entitled and numbered cause to the District Court of the United States for the Western District of Oklahoma; and that it will present said petition and bond to said District Court of Payne County, Oklahoma, for its action thereon, on the 4 day of December, 1926, at nine o'clock A. M. or as soon thereafter as said court can hear the same. A true and correct copy of said petition and bond is herewith delivered to you.

Rittenhouse & Rittenhouse, Attorneys for Defendant.

Service and receipt of the above and foregoing notice, together with a copy of the petition and bond for removal in said cause is acknowledged to have been made upon us, the attorneys of record for the plaintiff, on this 22 day of November, 1926.

Chester H. Lowry and R. J. Shive, Attorneys for Plaintiff.

JFW:CB.

[File endorsement omitted.]

(Bond on removal in the sum of $500, with The Royal Insurance company, Ltd., as principal and United States Fidelity and Guaranty company as surety, was given on the 17th day of November, A. D. 1926, and on the 4th day of December, A. D. 1926, said bond was approved by the district judge of the state court.)

[fol. 42] IN DISTRICT COURT OF PAYNE COUNTY

No. 8237

ORDER OF REMOVAL—Filed Dec. 4, 1926

Now on this 4 day of December, 1926, there comes on to be heard the petition heretofore filed by the defendant, Royal Insurance Company, Ltd., for the removal of this cause to the District Court of the United States for the

Western District of Oklahoma, the defendant appearing by its attorneys, Rittenhouse & Rittenhouse, and the plaintiff appearing by its attorneys Chester H. Lowry and R. J. Shive.

And the court having heard said petition and argument of its counsel thereon, and finding that said petition was duly filed before the day on which said defendant, Royal Insurance Company, was required by the law of this State to plead to plaintiff's petition herein, and further finding that said petition for removal is in due form and that said defendant duly made and filed therewith a bond with good and sufficient surety for its entering in said District Court of the United States for the Western District of Oklahoma within thirty days from the date of the filing of said petition for removal a certified copy of the record in this suit and for paying all costs that might be awarded by said District Court of the United States if said court shall find that this suit was wrongfully or improperly removed thereto and further finding that written notice of said petition and bond for removal was given by said defendant, Royal Insurance Company, Ltd., to the plaintiff or its attorneys of record, prior to the filing of same; and further finding that this is a suit of a civil nature in which the matter or amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00, and that the plaintiff is a citizen of Payne County, Oklahoma, and a resident of the Western District of said State, and that the defendant is a foreign corporation, organized and existing under the laws of England, is a citizen and resident of said country of England and a non-citizen and non-resident of the State of Oklahoma.

It Is, Therefore, by the Court Ordered that the prayer of said petitioner, for removal of this cause to the District Court of the United States for the Western District of Oklahoma be and the same is hereby granted and that the bond filed therewtih be and the same is hereby accepted and approved; that this court shall proceed no further with this suit and that the same be and it is hereby removed to the District Court of the United States for the Western District of Oklahoma, and that the clerk of this court be and is hereby ordered and directed to make a true and correct [fol. 43] transcript of the pleadings and proceedings in this cause and certify the same for transmissal and filing in

said District Court of the United States for the Western District of Oklahoma.

Charles C. Smith, District Judge. O. K. Chester H. Lowry, Attorney for Plaintiff. Rittenhouse & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

Transcript of record on removal endorsed: Filed in District Court on Jan. 11, 1927.

IN UNITED STATES DISTRICT COURT

(Case No. 3481)

ORDER, FEBRUARY 1, 1927, GRANTING LEAVE TO WITHDRAW MOTION, ETC.

(Before Judge Cotteral)

On this 1st day of February, 1927, the defendant appears by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys, and asks and is granted leave to withdraw motion to quash summons, and is given fifteen days from this date in which to plead herein.

IN UNITED STATES DISTRICT COURT

No. 3481 Law

DEMURRER—Filed Feb. 14, 1927

Now comes the defendant, Royal Insurance Company, Ltd., a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and demurs to the petition of the plaintiff filed in the above entitled and numbered cause and for grounds therefore states:

1. That plaintiff's petition wholly fails to state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

2. That plaintiff's petition is wholly insufficient to constitute a cause of action against this defendant for the reason that, as appears therefrom, the terms, provisions and conditions of the standard form of fire insurance policy therein [fol. 44] sued upon and as provided by Section 6767 Compiled Oklahoma Statutes 1921 were not complied with in this, that a proof of loss in the form required by said standard policy was not furnished to this defendant within the time and in the manner as required thereby.

3. That plaintiff's petition herein is wholly insufficient to constitute a cause of action as against this defendant in this, that same does not state facts sufficient to establish a waiver by his defendant of the requirement of such standard policy that said plaintiff furnished to this defendant within sixty days from the date of loss a proof of loss signed and sworn to by said assured and in the form as therein required.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

(Case No. 3481)

ORDER, MARCH 8, 1929, GRANTING LEAVE TO WITHDRAW DEMURRER, ETC.

(Before Judge Cotteral)

On this 8th day of March, 1927, the plaintiff appears by Messrs. Embry, Johnson & Tolbert, its attorneys, and the defendant by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys. Thereupon, the defendant asks and is granted leave to withdraw its demurrer to the petition, and file motion to make definite and certain herein, instanter.

IN UNITED STATES DISTRICT COURT

No. 3481. Law

MOTION TO MAKE MORE DEFINITE AND CERTAIN—Filed Mar. 8, 1927

Now comes the defendant, Royal Insurance Company, Ltd., a corporation, by its attorneys, Rittenhouse, Lee,

Webster & Rittenhouse, and moves the court to require the plaintiff to make its petition herein more definite and certain in the following particular, to-wit:

That said plaintiff be required to state whether or not it furnished to this defendant a proof of loss in the manner and form required by the standard policy of Oklahoma as set forth in Section 6767 of the Compiled Statutes Oklahoma [fol. 45] 1921, and if so, to set forth the date on which it furnished to this defendant such proof of loss.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

JFW:BK.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

(Case No. 3481)

ORDER, MAY 6, 1927, ON MOTION TO MAKE MORE DEFINITE AND CERTAIN

(Before Judge Cotteral)

On this 6th day of May, 1927, the plaintiff appears by Lowry Law Offices, its attorney, and the defendant by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys. Thereupon, motion to make petition definite and certain is confessed by plaintiff, and the plaintiff is given twenty days from this date in which to file amended petition herein.

IN UNITED STATES DISTRICT COURT

No. 3481. Law

MOTION TO DISMISS—Filed June 20, 1927

Now comes the defendant, The Royal Insurance Company, Ltd., a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and moves the court to dis-

miss the above entitled and numbered cause by reason of the failure of the plaintiff above named to comply with the order of this court entered herein on the 6th day of May, 1927, sustaining this defendant's motion to require the plaintiff to make its petition more definite and certain and allowing said plaintiff twenty days to file amended petition and respectfully shows unto the court in support thereof that said plaintiff has wholly failed and neglected to comply with said order and has wholly failed to file herein its amended petition in compliance therewith.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

JFW:BK.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

No. 3481. Law

FIRST AMENDED PETITION—Filed Aug. 18, 1927

Comes now the plaintiff above named and for cause of action against the defendant alleges and states:

I

That the plaintiff is a School District duly organized under the laws of the State of Oklahoma and is authorized to sue and be sued and to do business in its corporate name of School District No. 98 of Payne County, Oklahoma. The officers of the School Board of said School District No. 98 being G. P. Brooks, Director, V. I. Langston, Clerk, and J. E. Quigley, member, and this action being authorized and filed by direction of said School Board, said School Board having been duly authorized to prosecute this action at the last regular meeting of the legal voters of said School District.

II

That the defendant is a foreign corporation engaged in the insurance business and duly licensed and authorized to do business in the State of Oklahoma.

III

That on the 24th day of October, 1925, the defendant, for a valuable consideration in money, which has been accepted and received by the defendant, executed and delivered to the plaintiff an insurance policy by the terms of which policy the defendant agreed to insure and did insure the school building owned by the plaintiff School District on the Northeast Quarter of Section One, Township 18 North, Range 5 East, Payne County, Oklahoma, including all permanent fixtures therein, for a period of one year from the 24th day of October, 1925, to the 24th day of October, 1926, against all damage caused by fire, lightning, windstorms, cyclones and tornados [tornadoes] in the sum of $16,500.00; that said building with said fixtures therein was located as stated above at the time of the fire mentioned herein. A copy of said policy is attached to the original petition filed herein and is hereby referred to and made a part hereof.

IV

Plaintiff further alleges that on the 2nd day of January, 1926 said school building was completely destroyed by fire and was damaged, wrecked and destroyed so as to render same wholly unsafe and unfit for use; that the reasonable market value of said building at the time of such loss was [fol. 47] the sum of $75,000.00, which was a total loss to plaintiff except the salvage from said building which was of the value of $200.00. That all of the woodwork in said building was completely destroyed and the brick walls and foundations were so badly burned and damaged that they were worthless and dangerous and the Fire Marshal of the State of Oklahoma ordered said walls to be torn down and in compliance with said order said walls were torn down and removed at great expense to the plaintiff District. Plaintiff also states that at the same time and place all of said fixtures in said building and likewise described in said policy were totally destroyed by said fire and the same, including furniture then in said building and likewise destroyed by said fire, were of a reasonable market value of more than $3400.00.

V

Plaintiff further states that at the same time this defendant executed and delivered its policy of insurance

mentioned herein, to-wit on the 24th day of October, 1925, there were also executed and delivered to the plaintiff the following policies of insurance by the companies named, and said policies cover the same period of time as the policy issued by this defendant, to-wit:

Policy No. 825378 issued by The National Fire Insurance Company for the sum of $8500.00 with the same provisions and covering all the property above mentioned;

Policy No. 5503998 issued by the Fire Association of Philadelphia for the sum of $25,000.00 with the same provisions and covering the property above mentioned;

Policy No. 18,814, issued by the Concordia Insurance Company in the sum of $25,000.00, covering all of the property herein mentioned.

Plaintiff further alleges that at the time of the execution and delivery of said policies and at the time of the said fire, to-wit the 24th day of October, 1925 and 2nd day of January, 1926, respectively, W. A. Northgrave of Yale, Oklahoma, was the duly authorized local agent of said Royal Insurance Company and had the negotiations with the plaintiff leading to the delivery of its said policy to plaintiff; that A. E. Sloan of Yale, Oklahoma, was at said times the duly authorized local agent of said National Fire Insurance Company and said Fire Association of Philadelphia and had the negotiations with said plaintiff leading to the execution and delivery of the separate policies of said companies, and Charles Morris of Yale, Oklahoma, was the duly authorized local agent of Concordia Insurance Com- [fol. 48] pany and had negotiations with plaintiff leading to the execution and delivery of the policy of that Company. That on said 2nd day of January, 1926, and within two or three hours after said fire had so destroyed said building and the furniture and fixtures therein aforesaid, the plaintiff notified the said W. A. Northgrave and said A. E. Sloan and said Charles Morris of the said fire and of the extent of the damage and destruction thereof, with the request that said agents notify their said respective companies for which they were agents; that within two or three days thereafter the said Royal Insurance Company selected and appointed Guy Fuller, or Fuller Adjustment Company, as its duly authorized agent to investigate the said fire and make estimates as to the value of the property destroyed and settle for said loss; at the same time said

National Fire Insurance Company and said Fire Association of Philadelphia appointed said Guy Fuller or Fuller Adjustment Company and —— Klein as their duly appointed agents to investigate said fire and make estimates as to the value of the property destroyed and settle for said loss, and at the same time said Concordia Insurance Company appointed Lloyd J. Mullen as its duly authorized agent to investigate the said fire and make estimates as to the value of the property destroyed and settle for said loss. That said adjusters for said companies visited the scene of said fire and made examinations as to the value of the property destroyed and the circumstances surrounding said fire and had plaintiff to furnish them, said adjusters, with the items of said property so destroyed and the plans and specifications of the building, all of which was furnished by said plaintiff at the request of said adjusters as aforesaid, and said plaintiff was requested to and did furnish such assistance in this regard as it could to Mr. Frank Kebelman, who was the building contractor selected and appointed by said companies and their adjusters to make the estimate of such value of the property so destroyed and to obtain the correct information as to the condition of the property at the time of said loss as more fully appears by the letter from Fuller Adjustment Company dated February 3rd, 1926, a copy of which is attached hereto and made a part hereof as Exhibit "A". Plaintiff further states that thereafter on the 27th day of February, 1926, which was on the fifty-sixth day after said fire, said adjusters, to-wit Guy Fuller, Lloyd J. Mullen and Mr. Klein, met with the Board of said plaintiff, to-wit J. E. Quigley, G. D. Brooks and V. I. Langston, who were then said Board of said school, which meeting was held at Yale, Oklahoma, at the scene of said fire; that there was also [fol. 49] present at said meeting said Mr. Frank Kebelman, which meeting was held for the purpose of discussing the settlement and adjustment of said loss of plaintiff from said fire. That thereupon all of said insurance companies, acting through their said adjusters and agents, as aforesaid, at said meeting stated to the plaintiff, through its said Board, that they had made full and complete investigation as to said fire and the market value of the building and furniture and fixtures therein so destroyed by said fire and had obtained all and the correct informa-

tion thereon and that there was no question as to the loss upon said furniture and fixtures in said sum of $3400.00 and that said insurance companies were then and there ready to pay said plaintiff that sum for its loss upon said furniture and fixtures, such payment to be prorated among said insurance companies, stating at the same time that said furniture and fixtures were under valued for said insurance and were of a fair market value in excess of said sum of $3400.00. The said companies through their said adjusters and agents aforesaid at the same time stated that said building was over valued and could be replaced for the sum of approximately $53,000.00, and then said companies, through their said agents offered the palintiff the sum of approximately $56,000.00 as full payment for all of the loss to both said building and furniture and fixtures therein so destroyed by fire as aforesaid, payments to be pro rated among all of said insurance companies. The plaintiff declined to accept said amount and requested said insurance companies through their said adjusters to replace said building, inasmuch as said insurance companies contended that the same could be replaced for about $53,000.00 and had said Kebelman present with his figures to show that same could be replaced for about said amount. This, however, said insurance companies refused to do. Plaintiff further states that all of said property so destroyed by fire wes destroyed at the same fire and all of the facts and circumstances relating to said furniture and fixtures also existed as to said building and said plaintiff had only given said insurance companies the same notice in the one instance as in the other, and said companies at said meeting offered to pay the full amount of the insurance on said furniture and fixtures as the same was undervalued, and the only question as to the said building was as to the value thereof and the replacement value, which said insurance companies contended was about $53,000.00 and which the plaintiff, through its Board, contended was of the value of $75,000.00; that the attention of said plaintiff and its Board was directed only as to the value of said building and the replacement value thereof and was the only matter dis-
[fol. 50] cussed and as to which there was any disagreement at said meeting. That there was no objection made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that

said insurance companies at said meeting by their said conduct in offering to pay the full amount of said insurance upon the furniture and fixtures, stating that the same was of a greater value than $3,400.00 at the time of the loss and their said acts and conduct in offering to pay the sum of $53,000 in payment of the loss of said building, stating and contending that said building was only of the value of about $53,000.00 at said time and could be replaced for said sum of about $53,000.00, thereby led the plaintiff to believe that the only matter in dispute between said plaintiff and said insurance companies was the market and replacement value of said building, the insurance companies contending on one hand that the market and replacement value was the sum of $53,000.00 and said plaintiff contending that the same was $75,000.00 and this said defendant, together with the other insurance companies mentioned, has now, by reason of the facts aforesaid, waived the furnishing of proof of loss in strict accordance with the provisions of said policy and is estopped to set up and claim such failure as against the plaintiff in any particular. That said insurance companies through the examinations and efforts of their said adjusters and through the assistance of said Board rendered at the request of said adjusters, obtained all of the information which could have been obtained had proof of loss been furnished in strict conformity to the policies of insurance and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss and that no other or further proof or information as to said loss was required but was waived.

VI

Plaintiff further states that said defendant has failed and refused to pay anything on account of said loss although the same is due and payable.

VII

Plaintiff alleges that it has performed all of the other conditions of said policy to be performed on its part, except the furnishing of said proof of loss which has been waived on the part of said defendant and as to which it is now estopped to set up such failure to the prejudice of any right of said plaintiff.

Wherefore plaintiff prays for judgment against the defendant for the sum of $16,500.00 with interest thereon at the rate of six per cent per annum from the 2nd day of [fol. 51] January, 1926, and the costs of this action and for such other and further relief as may seem proper to the Court.

Rainey, Flynn, Green & Anderson, Lowry Law Office, Attorneys for Plaintiff.

(Exhibit A, letter Fuller Adjustment company to V. Langston, printed herewith as Exhibit A to first amended petition in Case No. 3473.)

[File endorsement omitted.]

In United States District Court

No. 3481

Motion to Dismiss—Filed Aug. 24, 1927

Now comes the defendant, Royal Insurance Company of Liverpool, England, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and moves the court to dismiss the above entitled and numbered cause and for grounds therefor states:

1. That on the 6th day of May, 1927, a motion filed by this defendant to make the plaintiff's original petition herein more definite and certain by setting forth the date on which said plaintiff claimed to have furnished to this defendant a proof of loss was sustained by this court, and said plaintiff given twenty days to comply therewith, but that said plaintiff, instead of complying with said order, has filed an amended petition wherein a distinct cause of action is attempted to be stated from that set forth in its original petition, without complying with said order.

2. That said amended petition was filed more than two months out of time and without leave of court and while there was pending in said cause a motion filed by this defendant to dismiss said cause for want of prosecution.

3. That said amended petition shows upon its face that it attempts to declare upon a different and distinct cause of action than that set forth in plaintiff's original petition and that the same is barred by the statute of limitations in such cases made and provided and by the period of limitations set forth and contained in the standard form of fire policy herein sued upon and provided for by Section 6767 of the Compiled Statutes of Oklahoma, 1921.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

No. 3481. Law

DEMURRER—Filed Sept. 8, 1927

Now comes the defendant, The Royal Insurance Company of Liverpool, England, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and demurs to the first amended petition of the plaintiff filed in the above entitled and numbered cause, and for grounds therefor states:

(1) That plaintiff's first amended petition wholly fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

(2) That plaintiff's first amended petition is wholly insufficient to constitute a cause of action against this defendant for the reason that, as appears therefrom, the terms, provisions and conditions of the standard form of fire insurance policy therein sued upon were not complied with, in that no proof of loss in the form required by such standard form policy was furnished to this defendant within the time and in the manner as required thereby; and in fact, has never been furnished as appears from said petition.

(3) That plaintiff's first amended petition herein is wholly insufficient to constitute a cause of action against this defendant in this, that the same does not state facts

sufficient to establish a written waiver by this defendant of the requirements of said policy, and that under the decisions of the Federal courts any waiver of the terms of the policy must be in writing, and it is not alleged in said first amended petition that said waiver was in writing; but that said plaintiff relies upon an oral waiver which is not recognized under the Federal rule.

(54) That the original petition fixed by the plaintiff did not state a cause of action for the reason that no proof of loss had been filed, and the plaintiff could not maintain an action without having filed such proof of loss, and that after the expiration of the statutory period of limitations, to-wit, one year, the plaintiff filed this first amended petition which sets up a cause of action based upon an alleged oral waiver, and that said first amended petition was not filed until after the running of the statute of limitations, and therefore, any cause of action on said policy is now barred by the statute of limitations.

F. A. Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

No. 3481. Law

ORDER ON MOTION AND DEMURRER—Filed Sept. 8, 1927

Now on this 8th day of September, 1927, the above cause comes on for hearing on the motion of the defendant above named to dismiss the first amended petition of the plaintiff filed herein, the plaintiff appearing by its attorneys, Rainey, Flynn, Green & Anderson, and the defendant appearing by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and the defendant having in open court, asked leave to withdraw the second ground of its said motion to dismiss, it is hereby ordered that the second ground of its motion to dismiss be and the same is hereby permitted to be and is withdrawn;

And the court having heard the statements and argument of counsel thereon, finds that said motion to dismiss

should be overruled for the reason that the matters and things presented thereby should be raised by demurrer, and It Is, Therefore, Ordered That said motion to dismiss be and the same is hereby overruled and said defendant is hereby given leave to file its demurrer instanter to the plaintiff's first amended petition.

And the court having heard the argument of counsel on the demurrer of said defendant to plaintiff's first amended petition, and being duly advised in the premises, takes the same under advisement, said defendant filing its brief in support of said demurrer with the court instanter, and said plaintiff is hereby given five days from this date in which to file its answer brief herein.

John H. Cotteral, Judge.

O. K. Geo. M. Green.

O. K. Rittenhouse, Lee, Webster & Rittenhouse, Attys. for Deft.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

(Case No. 3481)

ORDER, SEPTEMBER 26, 1927, OVERRULING MOTION TO DISMISS, ETC.

(Before Judge Cotteral)

On this 26th day of September, 1927, the plaintiff appears by Messrs. Rainey, Flynn, Green & Anderson, its attorneys, and the defendant by Messrs. Rittenhouse, Lee, [fol. 54] Webster & Rittenhouse, its attorneys. Thereupon, demurrer to petition and motion to dismiss heretofore submitted to the Court for determination, are now overruled and exceptions allowed the defendant, and the defendant is given twenty days from this date to file answer herein, and the plaintiff ten days thereafter to reply thereto.

IN UNITED STATES DISTRICT COURT

No. 3481. Law

ANSWER TO PLAINTIFF'S FIRST AMENDED PETITION—Filed Oct. 11, 1927

Comes now the defendant, Royal Insurance Company, Ltd., a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and for its answer to the first amended petition of plaintiff in the above entitled action, alleges and states:

1. Defendant denies each and every material allegation in said amended petition contained except such as are hereinafter specifically admitted.

2. Defendant admits that it is now and was at all times of interest herein a corporation as alleged in plaintiff's first amended petition, and admits that under date of October 24, 1925, it executed and delivered to the plaintiff a policy of fire insurance insuring the building and permanent fixtures constituting a part of said building of plaintiff *in the sum of $16,500.00, as alleged in plaintiff's first* amended petition, and admits that said policy was the standard form of policy prescribed by the statutes of Oklahoma. Defendant further admits that there were other policies of insurance covering said property in the amounts and in the companies mentioned in the beginning of Paragraph V of said first amended petition.

3. Further answering, this defendant states that said standard form of fire insurance policy upon which plaintiff brings this action contains the following valid and binding provision:

"If fire occur the insured, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and

[fol. 55] a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged;"

And that said standard form of policy also contains the following valid and binding provision:

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be specifically agreed hereon."

And said standard form of policy also contains the following valid and binding provision:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

And that said policy also contains the following valid and binding provisions:

"This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following

[fol. 56] stipulations and conditions printed on back hereof, which are hereby specifically referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

And defendant states that the plaintiff has wholly failed to render to defendant said statement, signed and sworn to by plaintiff as provided for in said policy under the provision relating thereto above quoted; and that said provision and requirement of said policy has never been waived by defendant in any manner whatsoever. That by reason of said facts, the plaintiff is not entitled to maintain this action and this action was pre-maturely brought by plaintiff.

4. For further answer, defendant states that no petition was ever filed by plaintiff against defendant and no action commenced by plaintiff against the defendant in which a petition was filed by plaintiff stating any cause of action whatever against defendant, within twelve months next after the fire complained of by plaintiff. That by reason of said facts, any cause of action which the plaintiff had or might have had against the defendant upon or under said policy of insurance, is barred by the statute of limitations and the limitation provided in said policy of insurance which is the standard statutory form of fire insurance policy as required and provided for by the Compiled Statutes of Oklahoma of 1921, Section 6767 thereof.

5. Defendant further states that by reason of said last above quoted provision of said policy of insurance, no officer, agent, or representative of defendant had power to waive any provision or condition of said policy of inter-

est herein, and that no waiver of any of the provisions of said policy of interest herein was ever written upon or attached to said policy. That none of the provisions of [fol. 57] said policy of insurance involved herein or in any wise of interest herein were ever waived by defendant.

6. Defendant further states that if it be liable to the plaintiff in any sum whatsoever in this action, which defendant denies, then and in that event, the liability of this defendant is limited by the provision of said policy above quoted relating thereto, to such proportion of any loss on the property and each item thereof, for loss or damage to which plaintiff has brought this action, as the amount of insurance under said policy covering upon said property, and each item thereof, bears to the whole insurance upon said property, and each item thereof. That upon said building and permanent fixtures constituting a part of said building, in such event, the defendant could only be held for such proportion of any loss thereon or damage thereto as $16,500.00 bears to $67,000.00.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by this action, and that defendant have judgment for its costs, and such other relief as to the court may seem proper.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

No. 3481. Law

Reply—Filed Oct. 25, 1927

Comes now the plaintiff and for reply to the answer of the defendant herein, alleges and states:

I

Replying to paragraph numbered three of the answer of said defendant, Plaintiff denies that the provision and re-

quirement of the policy set forth in said paragraph have never been waived by said defendant and further denies that plaintiff is not entitled to maintain the action and denies that same has been prematurely brought. Replying further to said paragraph plaintiff states that the provision and requirement referred to in said paragraph have been waived by said defendant as set forth in the first amended petition of plaintiff.

II

Replying to Paragraph No. 4 of said answer plaintiff denies the statements and allegations therein contained.

[fol. 58] III

Replying to Paragraph No. 5 of said answer plaintiff denies the statements and allegations therein contained.

IV

Replying to Paragraph No. 6 of said answer plaintiff denies the statements and allegations therein contained.

Wherefore, premises considered, plaintiff prays judgment as set forth in its first amended petition.

Rainey, Flynn, Green & Anderson, Lowry Law Offices, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 59] In District Court of Payne County, State of Oklahoma

No. 8238

School District No. 98 of Payne County, State of Oklahoma

vs.

The National Fire Insurance Company of Hartford, Conn., a Corporation, Defendant

Petition—Filed Oct. 28, 1926

Comes now the plaintiff above named, and, for cause of action against the defendant, alleges and states:

1. That the plaintiff is a School District duly organized under the laws of the State of Oklahoma and is authorized

to sue and to be sued and to do business in its corporate name of School District No. 98 of Payne County, State of Oklahoma; the officers of the School Board of said District No. 98 being G. P. Brooks, Director; V. I. Langston, Clerk and J. E. Quigley, Member; this action being authorized and filed by direction of said School Board and said School Board having been duly authorized to file this action at the last regular meeting of the legal voters of said School District.

2. That the defendant is a foreign corporation engaged in the insurance business and duly licensed and authorized to do business within the State of Oklahoma.

3. That on the 24th day of October, 1925, the defendant for valuable consideration, to-wit: the sum of $—— Dollars, which sum has been accepted and received by the defendant, executed and delivered to the plaintiff an insurance policy by the terms of which policy the defendant agreed to insure, and did insure, the school buildings owned by the plaintiff School District, for a period of one year from the 24th day of October, 1925, to the 24th day of October, 1926, against all damages caused by fire, lightening [lightning], wind-storms, cyclones and tornatoes [tornadoes] in the sum of Five Thousand Eight Hundred Thirty-Three Dollars and Thirty-Three Cents ($5833.33) and did agree to insure and did insure, the furniture and fixtures in said building for the sum of Eleven Hundred Thirty Three Dollars and Thirty Three Cents ($133.33) making a total of the sum of Sixty Nine Hunglred Sixty-Six Dollars and Sixty-Six cents ($6966.66). Plaintiff alleges that plaintiff is unable to atfach a copy of said insurance policy to this petition for *is not able to attach a copy of said insurance policy to this petition for* the reason that said insurance policy was completely destroyed in the fire hereinafter [fol. 60] mentioned, but alleges that said policy was the standard form of policy prescribed by Section 6767 of the Compiled Statutes of Oklahoma.

4. That on or about the 2nd day of January, 1926, said school building was completely destroyed by fire and was so damaged, wrecked and destroyed as to render said

building wholly unsafe and unfit for use. That the reasonable value of said building at the time of such loss was the sum of $80,000.00, which was a total loss to the plaintiff, except that the salvage from said building was of the value of $200.00. That all of the woodwork in said building was completely destroyed and the brick walls and foundations were so badly burned and damaged that they were worthless and dangerous, and the Fire Marshal of the State of Oklahoma ordered said walls to be torn down; and, in compliance with said order, said walls were torn down and removed at great expense to the plaintiff District.

5. That within a few days after said fire occurred the plaintiff notified the Agents of the defendant Insurance Company that said loss had occurred and the defendant sent its adjuster to adjust said loss, but said adjuster refused to allow the plaintiff an adequate amount for the loss which it had sustained by said fire, and the Defendant Company refused to rebuild or to replace said school building and has failed and refused to pay to the plaintiff the loss which it has sustained on account of said fire.

6. Plaintiff alleges that the plaintiff has performed all of the conditions of said policy on its part. That the defendant has not paid the said loss nor any part thereof.

Wherefore Plaintiff prays for judgment against the defendant for the sum of Sixty Nine Hundred Sixty-Six Dollars and Sixty-Six cents, ($6966.66) with interest thereon at the rate of six per cent (6%) per annum from the 2nd day of January, 1926, and the cost of this action, and for such other and further relief as the plaintiff may be entitled to under the facts set forth above.

Lowry Law Offices, by Chester H. Lowry and R. J. Shive, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 61] In District Court of Payne County

Special Appearance Motion—Filed Nov. 22, 1926

Now comes the defendant, The National Fire Insurance Company of Hartford, Connecticut, a corporation, by its

attorneys, Rittenhouse & Rittenhouse, and appearing specially and for the purpose of this motion only, moves the court to quash, set aside and hold for naught the purported issuance, service and return of summons in the above entitled and numbered cause for the reason that the same was not issued, served and returned in the manner required by law.

Rittenhouse & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

In District Court of Payne County

No. 8238

Petition for Removal of Cause to the District Court of the United States for the Western District of Oklahoma—Filed Nov. 22, 1926

Your petitioner, the National Fire Insurance Company, of Hartford, Connecticut, a corporation, respectfully shows that it is the defendant in the above entitled and numbered action and that the matter and amount involved and in controversy in said cause exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

Your petitioner further shows that said suit is of a civil nature and that in said suit there is a controversy which is wholly between citizens of different states, to-wit: between School District No. 98 of Payne County, Oklahoma, a municipal corporation, as plaintiff, and your petitioner as defendant; that the said plaintiff at the date of the commencement of this action was and still is a municipal corporation organized and existing under the laws of the State of Oklahoma, and your petitioner, the National Fire Insurance Company of Hartford, Connecticut, the defendant herein, at the date of the commencement of said suit was and still is a corporation organized and existing under and by virtue of the laws of the state of Connecticut, and it was and still is a non-resident and non-citizen of the state of Oklahoma. That the defendant, the National Fire Insurance Company of Hartford, Connecticut, has merely been admitted and licensed to do business in the State of Okla-

homa as a foreign corporation in accordance with the laws of the State of Oklahoma admitting and licensing foreign [fol. 62] corporations to do business in said state.

Your petitioner further shows that said action is a suit at law by the plaintiff for the purpose of recovering of and from the defendant a money judgment in the principal sum of $6966.86, together with interest thereon at the rate of six per cent per annum from the 2nd day of January, 1926, and the costs of said suit.

Your petitioner further shows that by the terms and provisions of the summons served upon it herein, and under the laws of the state of Oklahoma governing, it is not required to plead in this action until the 28th day of November, 1926.

Your petitioner offers herewith a bond with good and sufficient surety in the penal sum of $500.00 conditional for its entering in the district court of the United States for the Western District of Oklahoma, within thirty days from the date of the filing of this petition, a certified copy of the record in this action, and or paying all costs that may be awarded by said district court of the United States if said court should hold that this action was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this Honorable Court will make an order removing this cause to the District Court of the United States for the Western District of Oklahoma, and that this Honorable Court will proceed no further herein except to make said order of removal and to accept the said surety and bond, and to cause a duly certified copy of the record herein to be made for transmission to and filing in the District Court of the United States for the Western District of Oklahoma.

Rittenhouse & Rittenhouse, Attorneys for Defendant.

Duly sworn to by John F. Webster. Jurat omitted in printing.

[fol. 63] [File endorsement omitted.]

IN DISTRICT COURT OF PAYNE COUNTY

No. 8238

NOTICE OF REMOVAL—Filed Nov. 22, 1926

To the plaintiff, School District No. 98 of Payne County, State of Oklahoma, and its attorneys of record, Chester H. Lowry and R. J. Shive:

Please take notice that on the 22 day of November, 1926, the National Fire Insurance Company of Hartford, Connecticut, a corporation, defendant in the above entitled and numbered cause, will file in the District Court of Payne County, Oklahoma, its petition and bond for the removal of the above entitled and numbered cause to the District Court of the United States for the Western District of Oklahoma; and that it will present said petition and bond to said District Court of Payne County, Oklahoma, for its action thereon on the 4 day of Dec. 1926, at nine o'clock A. M., or as soon thereafter as said court can hear the same. A true and correct copy of said petition and said bond is herewith delivered to you. Kindly sign the acknowledgment and receipt appended below.

Rittenhouse & Rittenhouse, Attorneys for Defendant.

Service and receipt of the above and foregoing notice, together with a copy of the petition and bond for removal in said cause above entitled and numbered, is acknowledged to have been made upon us, the attorneys of record for the plaintiff on this 22 day of November, 1926.

Chester H. Lowry and R. J. Shive, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 64] (Bond on removal in the sum of $500, with the National Fire Insurance Company of Hartford, Connecticut, as principal and United States Fidelity & Guaranty Company as surety, was given on the 17th day of November, A. D. 1926, and on the 4th day of December, A. D. 1926, said bond was approved by the district judge of the state court.)

In District Court of Payne County

No. 8238

Order of Removal—Filed Dec. 4, 1926

Now on this 4 day of December, 1926, there comes on to be heard the petition heretofore filed by the defendant, The National Fire Insurance Company of Hartford, Connecticut, a corporation, for the removal of this cause to the District Court of the United States for the Western District of Oklahoma, the defendant appearing by its attorneys, Rittenhouse & Rittenhouse, and the plaintiff appearing by its attorneys, Chester H. Lowry and R. J. Shive.

And the court having heard said petition and argument of its counsel thereon, and finding that said petition was duly filed before the day on which said defendant, The National Fire Insurance Company of Hartford, Connecticut, a corporation, was required by the law of this State to plead to plaintiff's petition herein, and further finding that said petition for removal is in due form and that said defendant duly made and filed therewith a bond with good and sufficient surety for its entering in said District Court of the United States for the Western District of Oklahoma within thirty days from the date of the filing of said petition for removal a certified copy of the record in this suit and for paying all costs that might be awarded by said District Court of the United States if said court shall find that this suit was wrongfully or improperly removed thereto, and further finding that written notice of said petition and bond for removal was given by said defendant, The National Fire Insurance Company of Hartford, Connecticut, a corporation, to the plaintiff or its attorney of record, prior to the filing of same; and further finding that this is a suit of a civil nature, in which the matter or amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00, and that the plaintiff is a citizen of Payne County, State of Oklahoma, and a resident of the Western District of said State, and that the defendant is a corporation organized and existing under the laws of the State of Connecticut and is a citizen and resident of said State.

[fol. 65] It is, therefore, by the Court ordered that the prayer of said petitioner for removal of this cause to the District Court of the United States for the Western District of Oklahoma be and the same is hereby granted and that the bond filed therewith be and the same is hereby accepted and approved; that this court shall proceed no further with this suit and that the same be and it is hereby removed to the District Court of the United States for the Western District of Oklahoma and that the clerk of this court be and is hereby ordered and directed to make a true and correct transcript of the pleadings and proceedings in this cause and certify the same for transmissal and filing in said District Court of the United States for the Western District of Oklahoma.

Charles C. Smith, District Judge.

O. K. Chester H. Lowry, Attorney for Plaintiff.
O. K. Rittenhouse & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

Transcript of record on removal endorsed: Filed in District Court on Jan. 11, 1927.

In United States District Court

(Case No. 3482)

Order, February 1, 1927, Granting Leave to Withdraw Motion, etc.

(Before Judge Cotteral)

On this 1st day of February, 1927, the defendant appears by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys, and asks and is granted leave to withdraw motion to quash summons, and is given fifteen days from this date in which to plead further herein.

In United States District Court

No. 3428. Law

Demurrer—Filed Feb. 14, 1927

Now comes the defendant, The National Fire Insurance Company of Hartford, Connecticut, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and demurs to the petition of the plaintiff filed in the above entitled and numbered cause and for grounds therefor states:

1. That plaintiff's petition wholly fails to state facts [fol. 66] sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

2. That plaintiff's petition is wholly insufficient to constitute a cause of action against this defendant for the reason that, as appears therefrom, the terms, provisions and conditions of the standard form of fire insurance policy therein sued upon and as provided by Section 6767 Compiled Oklahoma Statutes 1921 were not complied with in this, that a proof of loss in the form required by said standard policy was not furnished to this defendant within the time and in the manner as required thereby.

3. That plaintiff's petition herein is wholly insufficient to constitute a cause of action as against this defendant in this, that same does not state facts sufficient to establish a waiver by this defendant of the requirement of such standard policy that said plaintiff furnished to this defendant within sixty days from the date of loss a proof of loss signed and sworn to by said assured and in the form as therein required.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

(Case No. 3482)

Order, March 8, 1929, Granting Leave to Withdraw, Demurrer, etc.

(Before Judge Cotteral)

On this 8th day of March, 1927, the plaintiff appears by Messrs. Embry, Johnson & Tolbert, its attorneys, and the defendant by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys. Thereupon, the defendant asks and is granted leave to withdraw its demurrer to the petition, and file motion to make definite and certain herein, instanter.

In United States District Court

No. 3482. Law

School District No. 98 of Payne County, Oklahoma, Plaintiff,

vs.

The National Fire Insurance Company of Hartford, Connecticut, a Corporation, Defendant

[fol. 67] Motion to Make More Definite and Certain—Filed Mar. 8, 1927

Now comes the defendant, National Fire Insurance Company of Hartford, Connecticut, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and moves the court to require the plaintiff to make its petition herein more definite and certain in the following particular, to-wit:

That said plaintiff be required to state whether or not it furnished to this defendant a proof of loss in the manner and form required by the standard policy of Oklahoma as set forth in Section 6767 of the Compiled Statutes Oklahoma, 1921, and if so, to set forth the date on which it furnished to this defendant such proof of loss.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

In United States District Court

(Case No. 3482)

Order, May 6, 1927, on Motion to Make More Definite and Certain

(Before Judge Cotteral)

On this 6th day of May, 1927, the plaintiff appears by Lowry Law Offices, its attorney, and the defendant by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys. Thereupon, motion to make petition definite and certain is confessed by the plaintiff, and the plaintiff is given twenty days from this date in which to file amended petition herein.

In United States District Court

No. 3482. Law

Motion to Dismiss. Filed June 20, 1927

Now comes the defendant, the National Fire Insurance Company, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and moves the court to dismiss the above entitled and numbered cause by reason of the failure of the plaintiff above named to comply with the order of this court entered herein on the 6th day of May, 1927, sustaining this defendant's motion to require the plaintiff to make its petition more definite and certain and allowing said plaintiff twenty days to file amended petition and respectfully shows unto the court in support thereof that said plaintiff has wholly failed to file herein [fol. 68] its amended petition in compliance therewith.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 3482. Law

FIRST AMENDED PETITION—Filed Aug. 18, 1927

Comes now the plaintiff above named and for cause of action against the defendant alleges and states:

I

That the plaintiff is a School District duly organized under the laws of the State of Oklahoma and is authorized to sue and be sued and to do business in its corporate name of School District No. 98 of Payne County, Oklahoma. The officers of the School Board of said School District No. 98 being G. P. Brooks, Director, V. I. Langston, Clerk, and J. E. Quigley, member, and this action being authorized and filed by direction of said School Board, said School Board having been duly authorized to prese*u*te [prosecute] this action at the last regular meeting of the legal voters of said School District.

II

That the defendant is a foreign corporation engaged in the insurance business and duly licensed and authorized to do business in the State of Oklahoma.

III

That on the 24th day of October, 1925, the defendant, for a valuable consideration in money, which has been accepted and received by the defendant, executed and delivered to the plaintiff an insurance policy by the terms of which policy the defendant agreed to insure and did insure the school building owned by the plaintiff School District on the Northeast Quarter of Section One, Township 18 North, Range 5 East, Payne County, Oklahoma, for a period of one year from the 24th day of October, 1925, to the 24th day of October, 1926, against all damage caused by fire, lightning, windstorms, cyclones and tornadoes in the sum of $5833.33 and did agree to insure and did insure the furniture and fixtures in said building, also owned by the [fol. 69] plaintiff, for the sum of $1133.33, making a total

of the sum of $6966.66. Plaintiff further alleges it is unable to attach a copy of said policy to this petition for the reason that the same was completely destroyed in the fire herein mentioned, but alleges that said policy was the standard form of policy prescribed by the statutes of Oklahoma. That said building was located as stated above and said furniture and fixtures were in said building at the time of said fire.

IV

Plaintiff further alleges that on the 2nd day of January, 1926 said school building was completely destroyed by fire and was damaged, wrecked and destroyed so as to render same wholly unsafe and unfit for use; that the reasonable market value of said building at the time of such loss was the sum of $75,000.00, which was a total loss to plaintiff except the salvage from said building which was of the value of $200.00. That all of the woodwork in said building was completely destroyed and the brick walls and foundation were so badly burned and damaged that they were worthless and dangerous and the Fire Marshal of the State of Oklahoma ordered said walls to be torn down and in compliance with said order said walls were torn down and removed at great expense to the plaintiff District. Plaintiff also states that at the same time and place all of said furniture and fixtures in said building and likewise described in said policy were totally destroyed by said fire and the same were then of a reasonable market value of more than $3400.00.

V

Plaintiff further states that at the same time this defendant executed and delivered its policy of insurance mentioned herein, to-wit on the 24th day of October, 1925, there were also executed and delivered to the plaintiff the following policies of insurance by the companies named, and said policies cover the same period of time as the policy issued by this defendant, to-wit:

Policy No. 5503998 issued by the Fire Association of Philadelphia for the sum of $25,000.00 with the same provisions and covering the property above mentioned;

Policy No. 9-C-1 issued by Royal Insurance Company of Liverpool, England, insuring the plaintiff against loss or damage to the building herein mentioned, in the sum of $16,500.00;

Policy No. 18,814, issued by the Concordia Insurance [fol. 70] Company in the sum of $25,000.00, covering all of the property hereinabove described.

Plaintiff further alleges that at the time of the execution and delivery of said policies and at the time of the said fire, to-wit the 24th day of October, 1925, and 2nd day of January, 1926, respectively, W. A. Northgrave of Yale, Oklahoma, was the duly authorized local agent of said Royal Insurance Company and had the negotiations with the plaintiff leading to the delivery of its said policy to plaintiff; that A. E. Sloan of Yale, Oklahoma, was at said times the duly authorized local agent of said National Fire Insurance Company and the said Fire Association of Philadelphia and had the negotiations with said plaintiff leading to the execution and delivery of the separate policies of said companies, and Charles Morris of Yale, Oklahoma, was the duly authorized local agent of Concordia Insurance Company and had negotiations with plaintiff leading to the execution and delivery of the policy of that Company. That on said 2nd day of January, 1926, and within two or three hours after said fire had so destroyed said building and the furniture and fixtures therein aforesaid, the plaintiff notified the said W. A. Northgrave and said A. E. Sloan and said Charles Morris of the said fire and of the extent of the damage and destruction thereof, with the request that said agents notify their said respective companies for which they were agents; that within two or three days thereafter the said Royal Insurance Company selected and appointed Guy Fuller, or Fuller Adjustment Company, as its duly authorized agent to investigate the said fire and make estimates as to the value of the property destroyed and settle for said loss; at the same time said National Fire Insurance Company and said Fire Association of Philadelphia appointed said Guy Fuller or Fuller Adjustment Company and —— Klein as their duly appointed agents to investigate said fire and make estimates as to the value of the property destroyed and settle for said loss, and at the same time said Con-

cordia Insurance Company appointed Lloyd J. Mullen as its duly authorized agent to investigate the said fire and make estimates as to the value of the property destroyed and settle for said loss. That said adjusters for said companies visited the scene of said fire and made examinations as to the value of the property destroyed and the circumstances surrounding said fire and had plaintiff to furnish them, said adjusters, with the items of said property so destroyed and the plans and specifications of the building, all of which was furnished by said plaintiff at the request of said adjusters as aforesaid, and said plain- [fol. 71] tiff was requested to and did furnish such assistance in this regard as it could to Mr. Frank Kebelman, who was the building contractor selected and appointed by said companies and their adjusters to make the estimate of such value of the property so destroyed and to obtain the correct information as to the condition of the property at the time of said loss as more fully appears by the letter from Fuller Adjust- [Adjustment] Company dated February 3rd, 1926, copy of which is attached hereto and made a part hereof as Exhibit "A". Plaintiff further states that thereafter on the 27th day of February, 1926, which was on the fifty-sixth day after said fire, said adjusters, to-wit Guy Fuller, Lloyd J. Mullen and Mr. Klein, met with the Board of said plaintiff, to-wit J. E. Quigley, G. D. Brooks and V. I. Langston, who were then said Board of said school, which meeting was held at Yale, Oklahoma, at the scene of the said fire; that there was also present at said meeting said Mr. Frank Kebelman, which meeting was held for the purpose of discussing the settlement and adjustment of said loss of plaintiff from said fire. That thereupon all of said insurance companies, acting through their said adjusters and agents, as aforesaid, at said meeting stated to the plaintiff, through its said Board, that they had made full and complete investigation as to said fire and the market value of the building and furniture and fixtures therein so destroyed by said fire and had obtained all and the correct information thereon and that there was no question as to the loss upon said furniture and fixtures in said sum of $3,400.00 and that said insurance companies were then and there ready to pay said plaintiff that sum for its loss upon said furniture and fixtures, such payment to be pro rated among

said insurance companies, stating at the same time that said furniture and fixtures were under valued for said insurance and were of a fair market value in excess of said sum of $3,400.00. The said companies through their said adjusters and agents aforesaid at the same time stated that said building was over valued and could be replaced for the sum of approximately $53,000.00, and then said companies, through their said agents offered the plaintiff the sum of approximately $56,000.00 as full payment for all of the loss to both said building and furniture and fixtures therein so destroyed by fire as aforesaid, payments to be pro rated among all of said insurance companies. The plaintiff declined to accept said amount and requested said insurance companies through their said adjusters to replace said building, inasmuch as said insurance companies contended that the same could be replaced for about $53,000.00 and had said Kebelman [fol. 72] present with his figures to show that same could be replaced for about said amount. This, however, said insurance companies refused to do. Plaintiff further states that all of said property so destroyed by fire was destroyed at the same fire and all of the facts and circumstances relating to said furniture and fixtures also existed as to said building and said plaintiff had only given said insurance companies the same notice in the one instance as in the other, and said companies at said meeting offered to pay the full amount of the insurance on said furniture and fixtures as the same was undervalued, and the only question as to the said building was as to the value thereof and the replacement value, which said insurance companies contended was about $53,000.00 and which the plaintiff, through its Board, contended was of the value of $75,000.00; that the attention of said plaintiff and its Board was directed only as to the value of said building and the replacement value thereof and was the only matter discussed and as to which there was any disagreement at said meeting. That there was no objection made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that said insurance companies at said meeting by their said conduct in offering to pay the full amount of said insurance upon the furniture and fixtures, stating that the same was of a greater value than $3,400.00 at the time of the

loss and their said acts and conduct in offering to pay the sum of $53,000 in payment of the loss of said building, stating and contending that said building was only of the value of about $53,000.00 at said time and could be replaced for said sum of about $53,000.00, thereby led the plaintiff to believe that the only matter in dispute between said plaintiff and said insurance companies was the market and replacement value of said building, the insurance companies contending on one hand that the market and replacement value was the sum of $53,000.00 and the said plaintiff contending that the same was $75,000.00 and this said defendant, together with the other insurance companies mentioned, has now, by reason of the facts aforesaid, waived the furnishing of proof of loss in strict accordance with the provisions of said policy and is estopped to set up and claim such failure as against the plaintiff in any particular. That said insurance companies through the examinations and efforts of their said adjusters and through the assistance of said Board rendered at the request of said adjusters, obtained all of the information which could have been obtained had proof of loss been furnished in strict conformity to the policies of insurance and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss [fol. 73] and that no other or further proof or information as to said loss was required but was waived.

VI

Plaintiff further states that said defendant has failed and refused to pay anything on account of said loss although the same is due and payable.

VII

Plaintiff alleges that it has performed all of the other conditions of said policy to be performed on its part, except the furnishing of said proof of loss which has been waived on the part of said defendant and as to which it is now estopped to set up such failure to the prejudice of any right of said plaintiff.

Wherefore plaintiff prays for judgment against the defendant for the sum of $6,966.66 with interest thereon at

the rate of six per cent per annum from the 2nd day of January, 1926 and the costs of this action and for such other and further relief as may seem proper to the Court.

Rainey, Flynn, Green & Anderson, Lowry Law Office, Attorneys for Plaintiff.

(Exhibit A, letter Fuller Adjustment Company to V. Langston, printed herewith as Exhibt A to first amended petition in case No. 3473.)

[File endorsement omitted.]

In United States District Court

No. 3482. Law

Motion to Dismiss—Filed Aug. 24, 1927

Now comes the defendant, National Fire Insurance Company, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and moves the court to dismiss the above entitled and numbered cause and for grounds therefor states:

1. That on the 6th day of May, 1927, a motion filed by this defendant to make the plaintiff's original petition herein more definite and certain by setting forth the date on which said plaintiff claimed to have furnished to this defendant a proof of loss was sustained by this court, and said plaintiff given twenty days to comply therewith, but that said plaintiff, instead of complying with said order, has filed an amended petition wherein a distinct cause of [fol. 74] action is attempted to be stated from that set forth in its original petition, without complying with said order.

2. That said amended petition was filed more than two months out of time and without leave of court and while there was pending in said cause a motion filed by this defendant to dismiss said cause for want of prosecution.

3. That said amended petition shows upon its face that it attempts to declare upon a different and distinct cause

of action than that set forth in plaintiff's original petition and that the same is barred by the statute of limitations in such cases made and provided and by the period of limitations set forth and contained in the standard form of fire policy herein sued upon and provided for by Section 6767 of the Compiled Statutes of Oklahoma, 1921.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

No. 3482. Law

Demurrer—Filed Sept. 8, 1927

Now comes the defendant, National Fire Insurance Company of Hartford, Connecticut, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and demurs to the first amended petition of the plaintiff filed in the above entitled and numbered cause, and for ground therefor states:

(1) That plaintiff's first amended petition wholly fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

(2) That plaintiff's first amended petition is wholly insufficient to constitute a cause of action against this defendant for the reason that, as appears therefrom, the terms, provisions and conditions of the standard form of fire insurance policy therein sued upon were not complied with in that no proof of loss in the form required by such standard form policy was furnished to this defendant within the time and in the manner as required thereby; and in fact, has never been furnished as appears from said petition.

(3) That plaintiff's first amended petition herein is wholly insufficient to constitute a cause of action against this defendant in this, that the same does not state facts [fol. 75] sufficient to establish a written waiver by this defendant of the requirements of said policy, and that under

the decisions of the Federal courts any waiver of the terms of the policy must be in writing, and it is not alleged in said first amended petition that said waiver was in writing; but that said plaintiff relies upon an oral waiver which is not recognized under the Federal rule.

(4) That the original petition fixed [filed] by the plaintiff did not state a cause of action for the reason that no proof of loss had been filed, and the plaintiff could not maintain an action without having filed such proof of loss, and that after the expiration of the statutory period of limitations, to-wit, one year, the plaintiff filed this first amended petition which sets up a cause of action based upon an alleged oral waiver, and that said first amended petition was not filed until after the running of the statute of limitations, and therefore, any cause of action on said policy is now barred by the statute of limitations.

F. A. Rittenhouse, Attorneys [Attorney] for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 3482. Law

ORDER ON MOTION AND DEMURRER—Filed Sept. 8, 1927

Now on this 8th day of September, 1927, the above cause comes on for hearing on the motion of the defendant above named to dismiss the first amended petition of the plaintiff filed herein, the plaintiff appearing by its attorneys, Rainey, Flynn, Green & Anderson, and the defendant appearing by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and the defendant having in open court asked leave to withdraw the second ground of its said motion to dismiss, it is hereby ordered that the second ground of its motion to dismiss be and the same is hereby permitted to be and is withdrawn;

And the court having heard the statements and argument of counsel thereon, finds that said motion to dismiss should re [be] overruled for the reason that the matters

and things presented thereby should be raised by demurrer, and

It is, therefore, ordered that said motion to dismiss be and the same is hereby overruled and said defendant is hereby given leave to file its demurrer instanter to the plaintiff's first amended petition.

[fol. 76] And the court having heard the argument of counsel on the demurrer of said defendant to plaintiff's first amended petition, and being duly advised in the premises, takes the same under advisement, said defendant filing its brief in support of said demurrer with the court instanter, and said plaintiff is hereby given five days from this date in which to file its answer brief herein.

John H. Cotteral, Judge.

OK. Geo. M. Green.

OK. Rittenhouse, Lee, Webster & Rittenhouse, Attys. for Deft.

[File endorsement omitted.]

In United States District Court

(Case No. 3482)

Order, September 26, 1927, Overruling Motion to Dismiss, etc.

(Before Judge Cotteral)

On this 26th day of September, 1927, the plaintiff appears by Messrs. Rainey, Flynn, Green & Anderson, its attorneys, and the defendant by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys. Thereupon, demurrer to petition and motion to dismiss heretofore submitted to the Court for determination, are now overruled and exceptions allowed the defendant, and the defendant is given twenty days from this date to file answer herein, and the plaintiff ten days thereafter to reply thereto.

In United States District Court

No. 3482. Law

Answer to Plaintiff's First Amended Petition—Filed Oct. 11, 1927

Comes now the defendant, The National Fire Insurance Company, a corporation, by its attorneys, Rittenhouse,

Lee, Webster & Rittenhouse, and for its answer to the first amended petition of plaintiff in the above entitled action, alleges and states:

1. Defendant denies each and every material allegation in said amended petition contained except such as are hereinafter specifically admitted.

2. Defendant admits that it is now and was at all times [fol. 77] of interest herein a corporation as alleged in plaintiff's first amended petition, and admits that under date of October 24, 1925, it executed and delivered to the plaintiff a policy of fire insurance insuring the building and permane-t fixtures constituting a part of said building of plaintiff in the sum of $5,833.33, as alleged in plaintiff's first amended petition, and covering the furniture and fixtures contained in said building in the sum of $908.89, and admits that said policy was the standard form of policy prescribed by the statutes of Oklahoma. Defendant further admits that there were other policies of insurance covering said property in the amounts and in the companies mentioned in the beginning of Paragraph V of said first amended petition.

3. Further answering, this defendant states that said standard form of fire insurance policy upon which plaintiff brings this action contains the following valid and binding provision:

"If fire occur the insured * * * within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged;"

And that said standard form of policy also contains the following valid and binding provision:

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received [fol. 78] by this company, including an award by appraisers when appraisal has been required.

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be specifically agreed hereon."

And said standard form of policy also contains the following valid and binding provision:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

And that said policy also contains the following valid and binding provision:

"This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this

Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

And defendant states that the plaintiff has wholly failed to render to defendant said statement, signed and sworn to by plaintiff as provided for in said policy under the provision [fol. 79] relating thereto above quoted; and that said provision and requirement of said policy has never been waived by defendant in any manner whatsoever. That by reason of said facts, the plaintiff is not entitled to maintain this action and this action was prematurely brought by plaintiff.

4. For further answer, defendant states that no petition was ever filed by plaintiff against defendant and no action commenced by plaintiff against the defendant in which a petition was filed by plaintiff stating any cause of action whatever against defendant, within twelve months next after the fire complained of by plaintiff. That by reason of said facts, any cause of action which the plaintiff had or might have had against the defendant upon or under said policy of insurance, is barred by the statute of limitations and the limitation provided in said policy of insurance which is the standard statutory form of fire insurance policy as required and provided for by the Compiled Statutes of Oklahoma of 1921, Section 6767 thereof.

5. Defendant further states that by reason of said last above quoted provisions of said policy of insurance no officer, agent, or representative of defendant had power to waive any provision or condition of said policy of interest herein, and that no waiver of any of the provisions of said policy of interest herein was ever written upon or attached to said policy. That none of the provisions of said policy of insurance involved herein or in any wise of interest herein were ever waived by defendant.

6. Defendant further states that if it be liable to the plaintiff in any sum whatsoever in this action, which defendant denies, then and in that event, the liability of this defendant is limited by the provision of said policy above quoted relating thereto, to such proportion of any loss on the property, and each item thereof, for loss or damage to which plaintiff has brought this action, as the amount of insurance under said policy covering upon said property, and each item thereof, bears to the whole insurance upon said property, and each item thereof. That upon said building and permanent fixtures constituting a part of said building, in such event, the defendant could only be held for such proportion of any loss thereon or damage thereto as $5,833.33 bears to $67,000.00, and that as to any loss upon said furniture and fixtures, this defendant could only be held for such proportion thereof as $908.89 bears to $3,175.55.

Wherefore, having fully answered defendant prays that plaintiff take nothing by this action, and that defendant [fol. 80] have judgment for its costs, and such other relief as to the court may seem proper.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

No. 3482. Law

Reply—Filed Oct. 25, 1927

Comes now the plaintiff and for reply to the answer of the defendant herein, alleges and states:

I

Replying to paragraph numbered three of the answer of said defendant, plaintiff denies that the provision and requirement of the policy set forth in said paragraph have never been waived by said defendant and further denies that plaintiff is not entitled to maintain the action and de-

nies that same has been prematurely brought. Replying further to said paragraph plaintiff states that the provision and requirement referred to in said paragraph have been waived by said defendant as set forth in the first amended petition of plaintiff.

II

Replying to Paragraph No. 4 of said answer, plaintiff denies the statements and allegations therein contained.

III

Replying to Paragraph No. 5 of said answer plaintiff denies the statements and allegations therein contained.

IV

Replying to Paragraph No. 6 of said answer plaintiff denies the statements and allegations therein contained.

Wherefore, premises considered, plaintiff prays judgment as set forth in its first amended petition.

Rainey, Flynn, Green & Anderson, Lowry Law Offices, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 81] In District Court of Payne County, State of Oklahoma

No. 8240

School District No. 98 of Payne County, State of Oklahoma Plaintiff,

vs.

Fire Association of Philadelphia, a Corporation, Defendant

Petition—Filed Oct. 28, 1926

Comes now the plaintiff above named, and, for cause of action against the defendant, alleges and states:

1. That the plaintiff is a School District duly organized under the laws of the State of Oklahoma and is authorized

to sue and to be sued and to do business in its corporate name of School District No. 98 of Payne County, State of Oklahoma; the officers of the School Board of said District No. 98 being G. P. Brooks, Director; V. I. Langston, Clerk and J. E. Quigley, Member; this action being authorized and filed by direction of said School Board, and said School Board having been duly authorized to file this action at the last regular meeting of the legal voters of said School District.

2. That the defendant is a foreign corporation engaged in the insurance business and duly licensed and authorized to do business within the State of Oklahoma.

3. That on the 24th day of October, 1925, the defendant for valuable consideration, to-wit, the sum of $ Dollars, which sum has been accepted and received by the defendant, executed and delivered to the plaintiff an insurance policy by the terms of which policy the defendant agreed to insure, and did insure, the school buildings owned by the plaintiff School District, for a period of one year from the 24th day of October, 1925, to the 24th day of October, 1926, against all damages caused by fire, lightening [lightning], wind-storms, cyclones and tornadoes in the sum of Twenty-Two Thousand, Three Hundred thirty-three dollars and Thirty-three cents ($22,333.33) and did agree to insure and did insure, the furniture and fixtures in said building for the sum of One Thousand One Hundred Thirty-Three Dollars and Thirty-three cents ($1133.33) making a total of of the sum of Twenty Three Thousand Four Hundred Sixty-Six Dollars and Sixty-Six Cents ($23,466.66). Plaintiff alleges that plaintiff is unable to attach a copy of said insurance policy to this petition for the reason that said insurance policy was completely destroyed in the fire hereinafter mentioned, but alleges that said policy was the standard form of policy prescribed by Section 6767 of of the Compiled Statutes of Oklahoma.

[fol. 82] 4. That on or about the 2nd day of January, 1926, said school building was completely destroyed by fire and was so damaged, wrecked, and destroyed as to render said building wholly unsafe and unfit for use. That the reasonable value of said building at the time of such loss was the sum of $80,000.00 which was a total loss to the plaintiff, except that the salvage from said building was of the value of $200.00. That all of the woodwork in said building was com-

pletely destroyed and the brick walls and foundation were so badly burned and damaged that they were worthless and dangerous, and the Fire Marshal/ [Marshal] of the State of Oklahoma ordered said walls to be torn down; and, in compliance with said order, said walls were torn down and removed at great expense to the Plaintiff District.

5. That within a few days after said fire occurred the plaintiff notified the Agents of the defendant Insurance Company that said loss had occurred and the defendant sent its adjuster to adjust said loss, but said adjuster refused to allow the plaintiff an adequate amount for the loss which it had sustained by said fire, and the Defendant Company refused to rebuild or to replace said school building and has failed and refused to pay to the plaintiff the loss which it has sustained on account of said fire.

Plaintiff alleges that the plaintiff has performed all of the conditions of said policy on its part. That the defendant has not paid the said loss nor any part thereof.

Wherefore Plaintiff prays for judgment against the defendant for the sum of Twenty Three Thousand, Four Hundred Sixty-Six Dollars and Sixty-Six Cents ($23,466.66), with interest thereon at the rate of six per cent (6%) per annum from the 2nd day of January, 1926, and the cost of this action, and for such other and further relief as the plaintiff may be entitled to under the facts sets forth above.

Lowry Law Offices, by Chester H. Lowry and R. J. Shive, Attorneys for Plaintiff.

[File endorsement omitted.]

IN DISTRICT COURT OF PAYNE COUNTY

SPECIAL APPEARANCE MOTION—Filed Nov. 22, 1926

Now comes the Fire Association of Philadelphia, a corporation, by its attorneys, Rittenhouse & Rittenhouse, and [fol. 83] appearing specially and for the purpose of this motion only, moves the court to quash, set aside and hold for naught the pretended summons and purported service thereof and for grounds therefor states:

(1)

That said pretended summons was not issued, drawn, served and returned in the manner provided by law.

Rittenhouse & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

In District Court of Payne County

No. 8240

Petition for Removal to the United States District Court for the Western District of Oklahoma—Filed Nov. 22, 1926

To the Honorable District Court of Payne County, Oklahoma:

Your petitioner, Fire Association of Philadelphia, a corporation, respectfully shows that it is the defendant in the above entitled and numbered action and that the matter and amount involved and in controversy in said cause, exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars.

Your petitioner further shows that said suit is of a civil nature and that in said suit there is a controversy which is wholly between citizens of different states, to-wit: between School District No. 98 of Payne County, State of Oklahoma, a citizen of Payne County, Oklahoma, in the Western District of said state, and your petitioner, Fire Association of Philadelphia a corporation, the defendant herein, who, at the date of the commencement of this action, was and still is a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and was and still is a citizen and resident of the State of Pennsylvania, and a non-citizen and non-resident of the State of Oklahoma. That the defendant, Fire Association of Philadelphia, a corporation, has merely been admitted and licensed to do business in the State of Oklahoma, as a foreign corporation in accordance with the Laws of the State of Oklahoma admitting and licensing foreign corporations to do business in the State of Oklahoma as a foreign corpo-

ration in accordance with the Laws of the State of the State [fol. 84] of Oklahoma admitting and licensing foreign corporations to do business in said state.

Your petitioner further shows that said action is a suit at law by the plaintiff for the purpose of recovering of and from this petitioning defendant a money judgment in the principal sum of $23,466.66, and for the costs of said action.

Your petitioner further shows that by the terms and provisions of the summons served upon it herein, and under the laws of the State of Oklahoma governing it, it is not required to plead in this case until the 28th day of November, 1926.

Your petitioner offers herewith a bond with good and sufficient surety in the penal sum of $500.00 conditioned for its entering in the District Court of the United States for the Western District of Oklahoma within thirty days from the filing of this petition, a certified copy of the record in this action, and for paying all costs that may be awarded by said District Court of the United States if said court should hold that this action has been wrongfully or improperly removed thereto.

Your petitioner, therefore, respectfully prays that this Honorable Court will make an order removing this cause to the District Court of United States for the Western District of Oklahoma, and that this Honorable Court will proceed no further herein except to make said order of removal and to accept the said surety and bond and to cause a duly certified copy of the record herein to be made for transmission to and filing in the District Court of the United States for the Western District of Oklahoma.

Rittenhouse & Rittenhouse, Attorneys for Defendant.

Duly sworn to by John F. Webster. Jurat omitted in printing.

[fol. 85] [File endorsement omitted.]

In District Court of Payne County

No. 8240

Notice of Removal—Filed Nov. 22, 1926

To the plaintiff, School District No. 98 of Payne County, State of Oklahoma, and its attorneys of record, Chester H. Lowry and R. J. Shive:

Please take notice that on the 22 day of November, 1926, the Fire Association of Philadelphia, a corporation, defendant in the above entitled and numbered action will file in the District Court of Payne County, Oklahoma, its petition and bond for removal of the above entitled and numbered cause to the Western District of Oklahoma, and that it will present said petition and bond to said District Court of Payne County, Oklahoma, for its action thereon on the 4 day of December, 1926, at nine o'clock A. M., or so soon thereafter as said court can hear the same. A true and correct copy of said petition and said bond is herewith delivered to you. Kindly sign the acknowledgment and receipt appended below.

Rittenhouse & Rittenhouse, Attorneys for Defendant, Fire Association of Philadelphia.

Service and receipt of the above and foregoing notice, together with a copy of the petition and bond for removal in said cause above entitled and numbered, is acknowledged to have been made upon us the attorneys of record for the plaintiff on the 22 day of November, 1926.

Chester H. Lowry and R. J. Shive.

[File endorsement omitted.]

[fol. 86] (Bond on removal in the sum of $500, with Fire Association of Philadelphia as principal and United States Fidelity and Guaranty company as surety, was given on the 17th day of November, A. D. 1926, and on the 4th day of December, A. D. 1926, said bond was approved by the district judge of the state court.)

IN DISTRICT COURT OF PAYNE COUNTY

ORDER OF REMOVAL—Filed Dec. 4, 1926

Now on this 4 day of December, 1926, there comes on to be heard the petition heretofore filed by the defendant, Fire Association of Philadelphia, a corporation, for the removal of this cause to the District Court of the United States for the Western District of Oklahoma, the defendant appearing by its attorneys, Rittenhouse & Rittenhouse, and the plaintiff appearing by its attorneys of record, Chester H. Lowry and R. J. Shive.

And the court having heard said petition and argument of counsel thereon, and finding that said petition was duly filed before the day of which said defendant, Fire Association of Philadelphia, a corporation, was required by the law of this state to plead to plaintiff's petition herein, and further finding that said petition for removal is in due form and that said defendant duly made and filed therewith a bond with good and sufficient surety for its entering in said District Court of the United States for the Western District of Oklahoma, within thirty days from the date of the filing of the petition for removal, a certified copy of the record in this suit, and for paying all costs that might be awarded by said District Court of the United States if said court shall find that this suit was wrongfully or improperly removed thereto; and further finding that written notice of said petition and bond for removal was given by said defendant, Fire Association of Philadelphia, a corporation, to the plaintiff, or its attorneys of record, prior to the filing of same; and further finding that this is a suit of civil nature in which the matter or amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000, and that the plaintiff is a citizen of the State of Oklahoma, and a resident of the Western District of said state, and that the defendant is a corporation organized and existing under the laws of the State of Pennsylvania and is a citizen and resident of the State of Pennsylvania.

It is, therefore, by the court ordered that the prayer of said petitioner for removal of this cause to the District [fol. 87] Court of the United States for the Western Dis-

trict of Oklahoma, be and the same is hereby granted; and that the bond filed therewith be and the same is hereby accepted and approved; that this court shall proceed no further with this suit, and that the same be and it is hereby removed to the District Court of the United States for the Western District of Oklahoma, and that the clerk of this court be and is hereby ordered and directed to make a true and correct transcript of the pleadings and proceedings in this cause, and certify the same for transmissal and filing in said District Court of the United States for the Western District of Oklahoma.

Charles C. Smith, District Judge.

O. K. Chester H. Lowry, Attorneys [Attorney] for Plaintiff.

O. K. Rittenhouse & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

Transcript of record on removal endorsed: Filed in District Court on Jan. 11, 1927.

IN UNITED STATES DISTRICT COURT

(Case No. 3483)

ORDER, FEBRUARY 1, 1927, GRANTING LEAVE TO WITHDRAW MOTION, ETC.

(Before Judge Cotteral)

On this 1st day of February, 1927, the defendant appears by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys, and asks and is granted leave to withdraw motion to quash summons, and is given fifteen days from this date in which to plead further herein.

IN UNITED STATES DISTRICT COURT

No. 3483. Law

DEMURRER—Filed Feb. 14, 1927

Now comes the defendant, Fire Association of Philadelphia, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and demurs to the petition of the [fol. 88] plaintiff filed in the above entitled and numbered cause and for grounds therefor states:

1. That plaintiff's petition wholly fails to state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

2. That plaintiff's petition is wholly insufficient to constitute a cause of action against this defendant for the reason that, as appears therefrom, the terms, provisions and conditions of the standard form of fire insurance policy therein sued upon and as provided by Section 6767 Compiled Oklahoma Statutes 1921 were not complied with in this, that a proof of loss in the form required by said standard policy was not furnished to this defendant within the time and in the manner as required thereby.

3. That plaintiff's petition herein is wholly insufficient to constitute a cause of action as against this defendant in this, that same does not state facts sufficient to establish a waiver by this defendant of the requirement of such standard policy that said plaintiff furnished to this defendant within sixty days from the date of loss a proof of loss signed and sworn to by said assured and in the form as therein required.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

(Case No. 3483)

ORDER, MARCH 8, 1927, GRANTING LEAVE TO WITHDRAW DEMURRER, ETC.

(Before Judge Cotteral)

On this 8th day of March, 1927, the plaintiff appears by Messrs. Embry, Johnson & Tolbert, its attorneys, and the defendant by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys. Thereupon, the defendant asks and is granted leave to withdraw its demurrer to the petition, and file motion to make definite and certain herein, instanter.

IN UNITED STATES DISTRICT COURT

No. 3483. Law

MOTION TO MAKE MORE DEFINITE AND CERTAIN—Filed Mar. 8, 1927

Now comes the defendant, Fire Association of Philadelphia, a corporation, by its attorneys, Rittenhouse, Lee, [fol. 89] Webster & Rittenhouse, and moves the court to require the plaintiff to make its petition herein more definite and certain in the following particular, to-wit:

That said plaintiff be required to state whether or not it furnished to this defendant a proof of loss in the manner and form required by the standard policy of Oklahoma as set forth in Section 6767 of the Compiled Statutes Oklahoma 1921, and if so, to set forth the date on which it furnished to this defendant such proof of loss.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

(Case No. 3483)

ORDER, MAY 6, 1927, ON MOTION TO MAKE MORE DEFINITE AND CERTAIN

(Before Judge Cotteral)

On this 6th day of May, 1927, the plaintiff appears by Lowry Law Offices, its attorney, and the defendant by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys. Thereupon, motion to make petition definite and certain is confessed by the plaintiff, and the plaintiff is given twenty days from this date in which to file amended petition herein.

IN UNITED STATES DISTRICT COURT

No. 3483. Law

MOTION TO DISMISS—Filed June 20, 1927

Now comes the defendant, Fire Association of Philadelphia, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and moves the court to dismiss the above entitled and numbered cause by reason of the failure of the plaintiff above named to comply with the order of this court entered herein on the 6th day of May, 1927, sustaining this defendant's motion to require the plaintiff to make its petition more definite and certain and allowing said plaintiff twenty days to file amended petition and respectfully shows unto the court in support thereof that said plaintiff has wholly failed and neglected to comply with said order and has wholly failed to file herein its amended petition in compliance therewith.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 90] IN UNITED STATES DISTRICT COURT

No. 3483. Law

FIRST AMENDED PETITION—Filed Aug. 18, 1927

Comes now the plaintiff above named and for cause of action against the defendant alleges and states:

I

That the plaintiff is a School District duly organized under the laws of the State of Oklahoma and is authorized to sue and be sued and to do business in its corporate name of School District No. 98 of Payne County, Oklahoma. The officers of the School Board of said School District No. 98 being G. P. Brooks, Director, V. I. Langston, Clerk, and J. E. Quigley, member, and this action being authorized and filed by direction of said School Board, said School Board having been duly authorized to prosecute this action at the last regular meeting of the legal voters of said School District.

II

That the defendant is a foreign corporation engaged in the insurance business and duly licensed and authorized to do business in the State of Oklahoma.

III

That on the 24th day of October, 1925 the defendant, for a valuable consideration in money, which has been accepted and received by the defendant, executed and delivered to the plaintiff an insurance policy by the terms of which policy the defendant agreed to insure and did insure the school building owned by the plaintiff School District on the Northeast Quarter of Section One, Township 18 North, Range 5 East, Payne County, Oklahoma, for a period of one year from the 24th day of October, 1925 to the 24th day of October, 1926 against all damage caused by fire, lightning, windstorms, cyclones and tornados [tornadoes] in the sum of $22,333.33 and did agree to insure and did insure the furniture and fixtures in said building,

also owned by the plaintiff, for the sum of $1,133.33, making a total of the sum of $23,466.66. Plaintiff further alleges it is unable to attach a copy of said policy to this petition for the reason that the same was completely destroyed in the fire herein mentioned, but alleges that said policy was the standard form of policy prescribed by the statutes of Oklahoma. That said building was located as stated above and said furniture and fixtures were in said building at the time of said fire.

[fol. 91] IV

Plaintiff further alleges that on the 2nd day of January, 1926 said school building was completely destroyed by fire and was damaged, wrecked and destroyed so as to render same wholly unfit and unsafe for use; that the reasonable market value of said building at the time of such loss was the sum of $75,000.00, which was a total loss to plaintiff except the salvage from said building which was of the value of $200.00. That all of the woodwork in said building was completely destroyed and the brick walls and foundation were so badly burned and damaged that they were worthless and dangerous and the Fire Marshal of the State of Oklahoma ordered said walls to be torn down and in compliance with said order said walls were torn down and removed at great expense to the plaintiff District. Plaintiff also states that at the same time and place all of said furniture and fixtures in said building and likewise described in said policy were totally destroyed by said fire and the same were then of a reasonable market value of more than $3,400.00.

V

Plaintiff further states that at the same time this defendant executed and delivered its policy of insurance mentioned herein, to-wit on the 24th day of October, 1925, there were also executed and delivered to the plaintiff the following policies of insurance by the companies named, and said policies cover the same period of time as the policy issued by this defendant, to-wit:

Policy No. 825378 issued by the National Fire Insurance Company for the sum of $8,500.00 with the same provisions and covering the property above mentioned;

Policy No. 9-C-1 issued by Royal Insurance Company of Liverpool, England, insuring the plaintiff against loss or damage to the building herein mentioned, in the sum of $16,500.00;

Policy No. 18,814, issued by the Concordia Insurance Company in the sum of $25,000.00, covering all of the property hereinabove described.

Plaintiff further alleges that at the time of the execution and delivery of said policies and at the time of the said fire, to-wit the 24th day of October, 1925 and 2nd day of January, 1926, respectively, W. A. Northgrave of Yale, Oklahoma was the duly authorized local agent of said Royal Insurance Company and had the negotiations with the [fol. 92] plaintiff leading to the delivery of its said policy to plaintiff; that A. E. Sloan of Yale, Oklahoma, was at said times the duly authorized local agent of said National Fire Insurance Company and said Fire Association of Philadelphia and had the negotiations with said plaintiff leading to the execution and delivery of the separate policies of said companies, and Charles Morris of Yale, Oklahoma, was the duly authorized local agent of Concordia Insurance Company and had negotiations with plaintiff leading to the execution and delivery of the policy of that Company. That on said 2nd day of January, 1926 and within two or three hours after said fire had so destroyed said building and the furniture and fixtures therein aforesaid, the plaintiff notified the said W. A. Northgrave and said A. E. Sloan and said Charles Morris of the said fire and of the extent of the damage and destruction thereof, with the request that said agents notify their said respective companies for which they were agents; that within two or three days thereafter the said Royal Insurance Company selected and appointed Guy Fuller, or Fuller Adjustment Company, as it duly authorized agent to investigate the said fire and make estimates as to the value of the property destroyed and settle for said loss; at the same time said National Fire Insurance Company and said Fire Association of Philadelphia appointed said Guy Fuller or Fuller Adjustment Company and —— Klein as their duly appointed agents to investigate said fire and make estimates as to the value of the property destroyed and settle for said loss, and at the same time said Concordia Insurance

Company appointed Lloyn J. Mullen as its duly authorized agent to investigate the said fire and make estimates as to the value of the property destroyed and settle for said loss. That said adjusters for said companies visited the scene of said fire and made examinations as to the value of the property destroyed and the circumstances surrounding said fire and had plaintiff to furnish them, said adjusters, with the items of said property so destroyed and the plans and specifications of the building, all of which was furnished by said plaintiff at the request of said adjusters as aforesaid, and said plaintiff was requested to and did furnish such assistance in this regard as it could to Mr. Frank Kebelman, who was the building contractor selected and appointed by said companies and their adjusters to make the estimate of such value of the property so destroyed and to obtain the correct information as to the condition of the property at the time of said loss as more fully appears by the letter from Fuller Adjustment Company dated February 3rd, 1926, copy of which is attached hereto and made a part hereof as Exhibit "A". [fol. 93] Plaintiff further states that thereafter on the 27th day of February, 1926, which was on the fifty-sixth day after said fire, said adjusters, to-wit Guy Fuller, Lloyd J. Mullen and Mr. Klein, met with the Board of said plaintiff, to-wit J. E. Quigley, G. D. Brooks and V. I. Langston, who were then said Board of said school, which meeting was held at Yale, Oklahoma at the scene of said fire; that there was also present at said meeting said Mr. Frank Kebelman, which meeting was held for the purpose of discussing the settlement and adjustment of said loss of plaintiff from said fire. That thereupon all of said insurance companies, acting through their said adjusters and agents, as aforesaid, at said meeting stated to the plaintiff, through its said Board, that they had made full and complete investigation as to said fire and the market value of the building and furniture and fixtures therein so destroyed by said fire and had obtained all and the correct information thereon and that there was no question as to the loss upon said furniture and fixtures in said sum of $3,400.00 and that said insurance companies were then and there ready to pay said plaintiff that sum for its loss upon said furniture and fixtures, such payment to be pro rated among said insurance companies,

stating at the same time that said furniture and fixtures were under valued for said insurance and were of a fair market value in excess of said sum of $3,400.00. The said companies through their said adjusters and agents aforesaid at the same time stated that said building was over valued and could be replaced for the sum of approximately $53,000.00, and then said companies, through their said agents offered the plaintiff the sum of approximately $56,000.00 as full payment for all of the loss to both said building and furniture and fixtures therein so destroyed by fire as aforesaid, payments to be pro rated among all of said insurance companies. The plaintiff declined to accept said amount and requested said insurance companies through their said adjusters to replace said building, inasmuch as said insurance companies contended that the same could be replaced for about $53,000.00 and had said Kebelman present with his figures to show that same could be replaced for about said amount. This, however, said insurance companies refused to do. Plaintiff further states that all of said property so destroyed by fire was destroyed at the same fire and all of the facts and circumstances relating to said furniture and fixtures also existed as to said building and said plaintiff had only given said insurance companies the same notice in the one instance as in the other, and said companies at said meeting offered to pay the [fol. 94] full amount of the insurance on said furniture and fixtures as the same was undervalued, and the only question as to the said building was as to the value thereof and the replacement value, which said insurance companies contended was about $53,000.00 and which the plaintiff, through its Board, contended was of the value of $75,000.00; that the attention of said plaintiff and its Board was directed only as to the value of said building and the replacement value thereof and was the only matter discussed and as to which there was any disagreement at said meeting. That there was no objection made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that said insurance companies at said meeting by their said conduct in offering to pay the full amount of said insurance upon the furniture and fixtures, stating that the same was of a greater value than $3,400.00 at the time of the loss and their said acts

and conduct in offering to pay the sum of $53,000 in payment of the loss of said building, stating and contending that said building was only of the value of about $53,000.00 at said time and could be replaced for said sum of about $53,000.00, thereby led the plaintiff to believe that the only matter in dispute between said plaintiff and said insurance companies was the market and replacement value of said building, the insurance companies contending on one hand that the market and replacement value was the sum of $53,000.00 and the said plaintiff contending that the same was $75,000.00 and this said defendant, together with the other insurance companies mentioned, has now, by reason of the facts aforesaid, waived the furnishing of proof of loss in strict accordance with the provisions of said policy and is estopped to set up and claim such failure as against the plaintiff in any particular. That said insurance companies through the examinations and efforts of their said adjusters and through the assistance of said Board rendered at the request of said adjusters, obtained all of the information which could have been obtained had proof of loss been furnished in strict conformity to the policies of insurance and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss and that no other or further proof or information as to said loss was required but was waived.

VI

Plaintiff further states that said defendant has failed and refused to pay anything on account of said loss although the same is due and payable.

[fol. 95]

VII

Plaintiff alleges that it has performed all of the other conditions of said policy to be performed on its part, except the furnishing of said proof of loss which has been waived on the part of said defendant and as to which it is now estopped to set up such failure to the prejudice of any right of said plaintiff.

Wherefore Plaintiff prays for judgment against the defendant for the sum of $23,466.66 with interest thereon at

the rate of six per cent per annum from the 2nd day of January, 1926 and the costs of this action and for such other and further relief as may seem proper to the Court.

Rainey, Flynn, Green & Anderson, Lowry Law Offices, Attorneys for Plaintiff.

(Exhibit A, letter Fuller Adjustment company to V. Langston, printed herewith as Exhibit A to first amended petition in case No. 3473.)

[File endorsement omitted.]

In United States District Court

No. 3483. Law

Motion to Dismiss—Filed Aug. 24, 1927

Now comes the defendant, Fire Association of Philadelphia, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and moves the court to dismiss the above entitled and numbered cause and for grounds therefor states:

1. That on the 6th day of May, 1927, a motion filed by this defendant to make the plaintiff's original petition herein more definite and certain by setting forth the date on which said plaintiff claimed to have furnished to this defendant a proof of loss, was sustained by this court, and said plaintiff given twenty days to comply therewith, but that said plaintiff, instead of complying with said order, has filed an amended petition wherein a distinct cause of action is attempted to be stated from that set forth in its original petition, without complying with said order.

2. That said amended petition was filed more than two months out of time and without leave of court and while there was pending in said cause a motion filed by this defendant to dismiss said cause for want of prosecution.

3. That said amended petition shows upon its face that it [fol. 96] attempts to declare upon a different and distinct cause of action than that set forth in plaintiff's original peti-

tion and that the same is barred by the statute of limitations in such cases made and provided and by the period of limitations set forth and contained in the standard form of fire policy herein sued upon and provided for by Section 6767 of the Compiled Statutes of Oklahoma, 1921.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 3483. Law

DEMURRER—Filed Sept. 8, 1927

Now comes the defendant, Fire Association of Philadelphia, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and demurs to the first amended petition of the plaintiff filed in the above entitled and numbered cause, and for grounds therefor states:

(1) That plaintiff's first amended petition wholly fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

(2) That plaintiff's first amended petition is wholly insufficient to constitute a cause of action against this defendant for the reason that, as appears therefrom, the terms, provisions and conditions of the standard form of fire insurance policy therein sued upon were not complied with in that no proof of loss in the form required by such standard form policy was furnished to this defendant within the time and in the manner as required thereby; and in fact, has never been furnished as appears from said petition.

(3) That plaintiff's first amended petition herein is wholly insufficient to constitute a cause of action against this defendant in this, that the same does not state facts sufficient to establish a written waiver by this defendant of the requirements of said policy, and that under the decisions of the Federal courts any waiver of the terms of the

policy must be in writing, and it is not alleged in said first amended petition that said waiver was in writing; but that said plaintiff relies upon an oral waiver which is not recognized under the Federal rule.

[fol. 97] (4) That the original petition fixed [filed] by the plaintiff did not state a cause of action for the reason that no proof of loss had been filed, and the plaintiff could not maintain an action without having filed such proof of loss, and that after the expiration of the statutory period of limitation, to wit, one year, the plaintiff filed this first amended petition which sets up a cause of action based upon an alleged oral waiver, and that said first amended petition was not filed until after the running of the statute of limitations, and therefore, any cause of action on said policy is now barred by the statute of limitations.

F. A. Rittenhouse, Attorney for Defendant.

[File endorsement omitted.]

In United States District Court

No. 3483. Law

Order on Motion and Demurrer—Filed Sept. 8, 1927

Now on this 8th day of September, 1927, the above cause comes on for hearing on the motion of the defendant above named to dismiss the first amended petition of the plaintiff filed herein, the plaintiff appearing by its attorneys, Rainey, Flynn, Green & Anderson, and the defendant appearing by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and the defendant having in open court asked leave to withdraw the second ground of its said motion to dismiss, it is hereby ordered that the second ground of its motion to dismiss said first amended petition of the plaintiff be and the same is hereby permitted to be and is withdrawn;

And the court having heard the statements and argument of counsel thereon, finds that said motion to dismiss should be overruled for the reason that the matters and things presented thereby should be raised by demurrer, and it is, therefore, ordered that said motion to dismiss be and the

same is hereby overruled and said defendant is hereby given leave to file its demurrer instanter to the plaintiff's first amended petition.

And the court having heard the argument of counsel on the demurrer of said defendant to plaintiff's first amended petition, and being duly advised in the premises, takes the same under advisement, said defendant filing its brief in support of said demurrer with the court instanter, and said [fol. 98] plaintiff is hereby given five days from this date in which to file its answer brief herein.

John H. Cotteral, Judge.

O. K. Rainey, Flynn, Green & Anderson.

O. K. Rittenhouse, Lee, Webster & Rittenhouse, Attys. for Deft.

[File endorsement omitted.]

In United States District Court

(Case No. 3483)

Order, September 26, 1927, Overruling Motion to Dismiss, etc.

(Before Judge Cotteral)

On this 26th day of September, 1927, the plaintiff appears by Messrs. Rainey, Flynn, Green & Anderson, its attorneys, and the defendant by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, its attorneys. Thereupon, demurrer to petition and motion to dismiss heretofore submitted to the Court for determination, are now overruled and exceptions allowed the defendant, and the defendant is given twenty days from this date to file answer herein, and the plaintiff ten days thereafter to reply thereto.

In United States District Court

No. 3483. Law

Answer to Plaintiff's First Amended Petition—Filed Oct. 11, 1927

Comes now the defendant, Fire Association of Philadelphia, a corporation, by its attorneys, Rittenhouse, Lee,

Webster & Rittenhouse, and for its answer to the first amended petition of plaintiff in the above entitled action, alleges and states:

1. Defendant denies each and every material allegation in said amended petition contained except such as are hereinafter specifically admitted.

2. Defendant admits that it is now and was at all times of interest herein a corporation as alleged in plaintiff's first amended petition, and admits that under date of October 24, 1925, it executed and delivered to the plaintiff a policy of fire insurance insuring the building and permanent fixtures constituting a part of said building of plaintiff in the sum of $22,333.33, as alleged in plaintiff's first amended [fol. 99] petition, and covering the furniture and fixtures contained in said building in the sum of $1,133.33, and admits that said policy was the standard form of policy prescribed by the statutes of Oklahoma. Defendant further admits that there were other policies of insurance covering said property in the amounts and in the companies mentioned in the beginning of Paragraph V of said first amended petition.

3. Further answering, this defendant states that said standard form of fire insurance policy upon which plaintiff brings this action contains the following valid and binding provision:

"If fire occur the insured * * * within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire; and shall furnish, if

required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged;"

And that said standard form of policy also contains the following valid and binding provision:

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by [fol. 100] solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be specifically agreed hereon."

And said standard form of policy also contains the following valid and binding provision:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

And that said policy also contains the following valid and binding provision:

"This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specifically referred to and made a part of this policy, together with such other provisions, agreements,

or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this Policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

And defendant states that the plaintiff has wholly failed to render to defendant said statement, signed and sworn to by plaintiff as provided for in said policy under the provision relating thereto above quoted; and that said provision and requirement of said policy has never been waived by defendant in any manner whatsoever. That by reason of said facts, the plaintiff is not entitled to maintain this action and this action was pre-maturely brought by plaintiff.

4. For further answer, defendant states that no petition was ever filed by plaintiff against defendant and no action [fol. 101] commenced by plaintiff against the defendant in which a petition was filed by plaintiff stating any cause of action whatever against defendant, within twelve months next after the fire complained of by plaintiff. That by reason of said facts, any cause of action which the plaintiff had or might have had against the defendant upon or under said policy of insurance, is barred by the statute of limitations and the limitation provided in said policy of insurance which is the standard statutory form of fire insurance policy as required and provided by the Compiled Statutes of Oklahoma of 1921, Section 6767 thereof.

5. Defendant further states that by reason of said last above quoted provision of said policy of insurance, no officer, agent or representative of defendant had power to waive any provision or condition of said policy of interest herein, and that no waiver of any of the provisions of said policy of interest herein was ever written upon or attached to said policy. That none of the provisions of said policy

of insurance involved herein or in any wise of interest herein were ever waived by defendant.

6. Defendant further states that if it be liable to the plaintiff in any sum whatsoever in this action, which defendant denies, then and in that event, the liability of this defendant is limited by the provision of said policy above quoted relating thereto, to such proportion of any loss on the property, and each item thereof, for loss or damage to which plaintiff has brought this action, as the amount of insurance under said policy covering upon said property, and each item thereof, bears to the whole insurance upon said property, and each item thereof. That upon said building and permanent fixtures constituting a part of said building, in such event, the defendant could only be held for such proportion of any loss thereon or damage thereto as $22,333.33 bears to $67,000.00, and that as to any loss upon said furniture and fixtures, this defendant could only be held for such proportion thereof as $1,133.33 bears to $3,175.55.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by this action, and that defendant have judgment for its costs, and such other relief as to the court m-y seem proper.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 102] In United States District Court

No. 3483. Law

Reply—Filed Oct. 25, 1927

Comes now the plaintiff and for reply to the answer of the defendant herein, alleges and states:

I

Replying to paragraph numbered three of the answer of said defendant, plaintiff denies that the provision and re-

quirement of the policy set forth in said paragraph have never been waived by said defendant and further denies that plaintiff is not entitled to maintain the action and denies that the same has been prematurely brought. Replying further to said paragraph plaintiff states that the provision and requirement referred to in said paragraph have been waived by said defendant as set forth in the first amended petition of plaintiff.

II

Replying to paragraph No. 4 of said answer plaintiff denies the statements and allegations therein contained.

III

Replying to Paragraph No. 5 of said answer plaintiff denies the statements and allegations therein contained.

IV

Replying to Paragraph No. 6 of said answer plaintiff denies the statements and allegations therein contained.

Wherefore, premises considered, plaintiff prays judgment as set forth in its first amended petition.

Rainey, Flynn, Green & Anderson, Lowry Law Offices, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 103] In United States District Court

Stipulation Consolidating Cases for Trial—Filed Jan. 14, 1929

Comes now the plaintiff by its attorneys and the defendants by their attorneys and hereby stipulate and agree that all of the above entitled actions may be consolidated for the purpose of trial and all tried at the same time and separate verdicts be rendered by the jury as to each case.

It is further stipulated and agreed that any and all objections made by any or either of the defendants, and

all exceptions reserved by any or either of them, shall be for the benefit of each and all of said defendants.

Dated this 14th day of January, 1929.

Chester H. Lowry, Rainey, Flynn, Green & Anderson, Attorneys for Plaintiff. Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendants. H. C. Thurman, Atty. for Concordia.

[File endorsement omitted.]

In United States District Court

No. 3473. Law

Journal Entry of Judgment—Filed Jan. 18, 1929

Now on this the 14th day of January, 1929, the above entitled cause comes on for hearing in its regular order, and also the case of School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. Royal Insurance Company, Ltd., Defendant, No. 3481 Law, and School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. The National Fire Insurance Company, Defendant, No. 3482 Law, and the case of School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. Fire Association of Philadelphia, Defendant, No. 3483 Law, coming on for trial at the same time and the issues involved in all of said actions being the same and plaintiff and defendants appearing by their counsel each announce ready for trial, and stipulate and agree that all of said actions may be consolidated for the purpose of trial and a separate verdict be rendered by the jury in each action.

Thereupon, a jury of twelve good and lawful men were duly selected, impaneled and sworn and the trial of this action having proceeded until the hour of adjournment [fol. 104] having arrived and the same not being completed, the court is duly and legally adjourned until January 15, 1929.

Now on this the 15th day of January, 1929, the court having duly and legally convened in pursuance of said adjournment, the trial of this cause is resumed and the

hour of adjournment having arrived and the trial not being completed, the court is duly and legally adjourned until Janary 16, 1929.

Now on this the 16th day of January, 1929, the court duly and legally convened in pursuance of said adjournment and the trial of this action resumed and the hour of adjournment having arrived and the trial not being completed, the court is duly and legally adjourned until January 17, 1929.

Now on this the 17th day of January, 1929, the court duly and legally convened pursuant to said adjournment and plaintiff and defendant having introduced their evidence and having argued the case to the jury and the court having charged said jury, the jury retired to consider their verdict and thereafter in open court returned their verdict in words and figures as follows, to-wit:

"We, the jury in the above-entitled case, duly impenaled [impaneled] and sworn, upon our oaths find for the plaintiff, and assess its damages at Twenty One Thousand Four Hundred Sixty Six & 66/100 Dollars. $21,466.66.

Bldg. & Perm. Fixtures	$20,333.33
Movable	1,133.33
	21,466.66

L. J. Bell, Foreman."

which verdict is duly received and filed and to which verdict the defendant reserved its exceptions, and which exceptions were allowed.

The court reserves the rendition of judgment upon said verdict until 9:30 o'clock A. M., January 18, 1929.

Now on this the 18th day of January, 1929, at the hour of 9:30 A. M., the court having duly and legally convened in pursuance of the previous day's adjournment, finds that judgment should be rendered upon said verdict and that plaintiff is entitled to recover of and from the defendant, Concordia Insurance Company, the principal sum of Twenty-one Thousand Four Hundred Sixty-Six and 66/100 ($21,466.66) Dollars, and that plaintiff is entitled to recover in addition thereto interest upon said amount at the

[fol. 105] rate of 6 per cent per annum from May 2, 1926, to this date, which interest amounts to the sum of Three Thousand Four Hundred Ninety-one and 88/100 ($3,491.88) Dollars, making a total plaintiff is entitled to recover of and from the defendant of Twenty-four Thousand Nine Hundred Fifty-eight and 54/100 ($24,928.54) Dollars, and is further entitled to recover of and from the defendant the costs of this action.

It is therefore by the court ordered, adjudged and decreed that plaintiff have and recover of and from the defendant, Concordia Insurance Company, the sum of Twenty-Four Thousand Nine Hundred Fifty-eight and 54/100 ($24,958.54) Dollars, together with the costs of this action, and that this judgment bear interest at the rate of 6 per cent per annum from this date until paid. For all of which let execution issue. Upon request of defendant it is allowed three days to file motion for new trial and execution is stayed pending the hearing thereof.

To all of which the defendant excepts, and which exceptions are allowed.

Edgar S. Vaught, Judge.

O. K. Rainey, Flynn, Green & Anderson, Attorneys for Plaintiff.

O. K. as to form. H. C. Thurman, Atty. for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 3481. Law

JOURNAL ENTRY OF JUDGMENT—Filed Jan. 18, 1929

Now on this the 14th day of January, 1929, the above entitled cause comes on for hearing in its regular order, and also the case of School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. The National Fire Insurance Company, Defendant, No. 3482 Law, and School District No. 98 of Payne County, State of Oklahoma, Plaintiff vs. Fire Association of Philadelphia, De-

fendant, No. 3483 Law, and the case of School District No. 98 of Payne County, State of Oklahoma, Plaintiff vs. Concordia Insurance Company, Defendant, No. 3473 Law, coming on for trial at the same time and the issues involved [fol. 106] in all of said actions being the same and plaintiff and defendants appearing by their counsel each announce ready for trial, and stipulate and agree that all of said actions may be consolidated for the purpose of trial and a separate verdict be rendered by the jury in each action.

Thereupon, a jury of twelve good and lawful men were duly selected, impaneled and sworn and the trial of this action having proceeded until the hour of adjournment having arrived and the same not being completed, the court is duly and legally adjourned until January 15, 1929.

Now on this the 15th day of January, 1929, the court having duly and legally convened in pursuance of said adjournment, the trial of this cause is resumed and the hour of adjournment having arrived and the trial not being completed, the court is duly and legally adjourned until January 16, 1929.

Now on this the 16th day of January, 1929, the court duly and legally convened in pursuance of said adjournment and the trial of this action resumed and the hour of adjournment having arrived and the trial not being completed, the court is duly and legally adjourned until January 17, 1929.

Now on this the 17th day of January, 1929, the court is duly and legally convened pursuant to said adjournment and plaintiff and defendant having introduced their evidence and having argued the case to the jury and the court having charged said jury, the jury retired to consider their verdict and thereafter in open court returned their verdict in words and figures, as follows, to-wit:

"We, the jury in the above-entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess its damages at Fifteen Thousand Twenty Three & 69/100 Dollars. $15,023.69.

L. J. Bell, Foreman."

which verdict is duly received and filed and to which verdict the defendant reserved its exceptions, and which exceptions were allowed.

The court reserves the rendition of judgment upon said verdict until 9:30 o'clock A. M., January 18, 1929.

Now on this the 18th day of January, 1929, at the hour of 9:30 A. M., the court having duly and legally convened in pursuance of the previous day's adjournment, finds that judgment should be rendered upon said verdict and that plaintiff is entitled to recover of and from the defendant, [fol. 107] Royal Insurance Company, Ltd., a corporation, the principal sum of Fifteen Thousand Twenty-three and 69/100 ($15,023.69) Dollars, and that plaintiff is entitled to recover in addition thereto interest upon said amount at the rate of 6 per cent per annum from May 2, 1926, to this date, which interest amounts to the sum of Two Thousand Four Hundred Forty-three and 84/100 ($2,443.84) Dollars making a total plaintiff is entitled to recover of and from the defendant of Seventeen Thousand Four Hundred Sixty Seven and 53/100 ($17,467.53) Dollars, and is further entitled to recover of and from the defendant the costs of this action.

It is therefore by the court ordered adjudged and decreed that plaintiff have and recover of and from the defendant, Royal Insurance Company, Ltd., the sum of Seventeen Thousand Four Hundred Sixty Seven and 53/100 ($17,467.53) Dollars, together with the costs of this action, and that this judgment bear interest at the rate of 6 per cent per annum from this date until paid. For all of which let execution issue.

To all of which the defendant excepts, and which exceptions are allowed.

Edgar S. Vaught, Judge.

O. K. Rainey, Flynn, Green & Anderson, Attorneys for Plaintiff. Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

No. 3482. Law

Journal Entry of Judgment—Filed Jan. 18, 1929

Now on this the 14th day of January, 1929, the above entitled cause comes on for hearing in its regular order, and

also the case of School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. Royal Insurance Company, Ltd., Defendant, No. 3481 Law, and School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. Fire Asscciation of Philadelphia, Defendant, No. 3483 Law, and the case of School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. Concordia Insurance Company, Defendant, No. 3473 Law, coming on for trial at the same time and the issues involved in all of said [fol. 108] actions being the same and plaintiff and defendants appearing by their counsel each announce ready for trial, and stipulate and agree that all of said actions may be consolidated for the purpose of trial and a separate verdict be rendered by the jury in each action.

Thereupon, a jury of twelve good and lawful men were duly selected, impaneled and sworn and the trial of this action having proceeded until the hour of adjournment having arrived and the same not being completed, the court is duly and legally adjourned until January 15, 1929.

Now, on this the 15th day of January, 1929, the court having duly and legally convened in pursuance of said adjournment, the trial of this cause is resumed and the hour of adjournment having arrived and the trial not being completed, the court is duly and legally adjourned until January 16, 1929.

Now, on this the 16th day of January, 1929, the court duly and legally convened in pursuance of said adjournment, and the trial of this action resumed and the hour of adjournment having arrived and the trial not being completed, the court is duly and legally adjourned until January 17, 1929.

Now, on this the 17th day of January, 1929, the court is duly and legally convened pursuant to said adjournment and plaintiff and defendant having introduced their evidence and having argued the case to the jury, and the court having charged said jury, the jury retired to consider their verdict and thereafter in open court returned their verdict in words and figures as follows, to-wit:

"We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess

its damages at Six Thousand Four Hundred Forty Two & 97/100 Dollars. $6,442.97.

Bldg. & Perm. fixtures	5309.64
Mova*/be* [Movable]	1133.33
	6442.97

L. J. Bell, Foreman."

which verdict is duly received and filed and to which verdict the defendant reserved its exceptions and which exceptions were allowed.

The court reserved the rendition of judgment upon said verdict until 9:30 o'clock A. M., January 18, 1929.

Now, on this the 18th day of January, 1929, at the hour of [fol. 109] 9:30 A. M., the court having duly and legally convened in pursuance of the previous day's adjournment, finds that judgment should be rendered upon said verdict, and that plaintiff is entitled to recover of and from the defendant, The National Fire Insurance Company, the principal sum of Six Thousand Four Hundred Forty-two and 97/100 ($6,442.97) Dollars, and that plaintiff is entitled to recover in addition thereto interest upon said amount at the rate of 6 per cent per annum from May 2, 1926, to this date, which interest amount- [amounts] to the sum of One Thousand Forty-eight and 04/100 ($1,048.04) Dollars, making a total plaintiff is entitled to recover of and from the defendant of Seven Thousand Four Hundred Ninety One and 01/100 ($7,491.01) Dollars, and is further entitled to recover of and from the defendant the costs of this action.

It is therefore by the court ordered, adjudged and decreed that plaintiff have and recover of and from the defendant, The National Fire Insurance Company, the sum of Seven Thousand Four Hundred Ninety One and 01/100 ($7,491.01) Dollars, together with the costs of this action and that this judgment bear interest at the rate of 6 per cent per annum from this date until paid. For all of which let execution issue.

To all of which the defendant excepts and which exceptions are allowed.

Edgar S. Vaught, Judge.

O. K. Rainey, Flynn, Green & Anderson, Attorneys for Plaintiff. Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

No. 3483. Law

Journal Entry of Judgment—Filed Jan. 18, 1929

Now on this the 14th day of January, 1929, the above entitled cause comes on for hearing in its regular order, and also the case of School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. Royal Insurance Company, Ltd., Defendant, No. 3481 Law, and School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. [fol. 110] The National Fire Insurance Company, Defendant, No. 3482 Law, and the case of School District No. 98 of Payne County, State of Oklahoma, Plaintiff, vs. Concordia Insurance Company, Defendant, No. 3473 Law, coming on for trial at the same time and the issues involved in all of said actions being the same and plaintiff and defendants appearing by their counsel each announce ready for trial, and stipulate and agree that all of said actions may be consolidated for the purpose of trial and a separate verdict be rendered by the jury in each action.

Thereupon, a jury of twelve good and lawful men were duly selected, impaneled and sworn and the trial of this action having proceeded until the hour of adjournment having arrived and the same not being completed, the court is duly and legally adjourned until January 15, 1929.

Now on this the 15th day of January, 1929, the court having duly and legally convened in pursuance of said adjournment, the trial of this cause is resumed and the hour of adjournment having arrived and the trial not being completed, the court is duly and legally adjourned until January, 16, 1929.

Now, on this the 16th day of January, 1929, the court duly and legally convened in pursuance of said adjourn-

ment, and the trial of this action resumed and the hour of adjournment having arrived and the trial not being completed, the court is duly and legally adjourned until January 17, 1929.

Now on this the 17th day of January, 1929, the court is duly and legally convened pursuant to said adjournment and plaintiff and defendant having introduced their evidence and having argued the case to the jury, and the court having charged said jury, the jury retired to consider their verdict and thereafter in open court returned their verdict in words and figures as follows, to-wit:

"We, the jury in the above-entitled case, duly impaneled, and sworn, upon our oaths find for the plaintiff, and assess its damages at Twenty One Thousand Four Hundred Sixty Six & 66/100 Dollars. $21,466.66.

Bldg. & Perm. Fixtures	20,333.33
Movable	1,133.33
	21,466.66

L. J. Bell, Foreman."

which verdict is duly received and filed and to which verdict the defendant reserved its exceptions and which exceptions were allowed.

[fol. 111] The court reserves the rendition of judgment upon said verdict until 9:30 o'clock A. M., January 18, 1929.

Now on this the 18th day of January, 1929, at the hour of 9:30 A. M., the court having duly and legally convened in pursuance of the previous day's adjournment, finds that judgment should be rendered upon said verdict, and that plaintiff is entitled to recover of and from the defendant, Fire Association of Philadelphia, the principal sum of Twenty-one Thousand Four Hundred Sixty-six 66/100 ($21,466.66) Dollars, and that plaintiff is entitled to recover in addition thereto interest upon said amount at the rate of 6 per cent per annum from May 2, 1926, to this date, which interest amounts to the sum of Three Thousand Four Hundred Ninety-one and 88/100 ($3,491.88) Dollars, making a total plaintiff is entitled to recover of and from the defendant of Twenty-four Thousand Nine Hundred Fifty-eight and

54/100 ($24,958.54) Dollars, and is further entitled to recover of and from the defendant the costs of this action.

It is therefore by the court ordered, adjudged and decreed that plaintiff have and recover of and from the defendant, Fire Association of Philadelphia, the sum of Twenty-four Thousand Nine Hundred Fifty-eight and 54/100 ($24,958.54) Dollars, together with the costs of this action and that this judgment bear interest at the rate of 6 per cent per annum from this date until paid. For all of which let execution issue.

To all of which the defendant excepts and which exceptions are allowed.

Edgar S. Vaught, Judge.

O. K. Bailey, Flynn, Green & Anderson, Attorneys for Plaintiff. Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

No. 3473. Law

Motion for New Trial. Filed Jan. 19, 1929

Comes now the defendant, Concordia Insurance Company, by its attorney, H. C. Thurman, and moves the court to [fol. 112] vacate and set aside the verdict and judgment and to grant a new trial in the above entitled cause upon the following grounds and for the following reasons which affect materially the substantial rights of this defendant:

1. That the court erred in overruling the demurrer of said defendant to the amended petition of the plaintiff, to which ruling of the court this defendant then and there excepted and its exception was allowed.

2. That said court erred in overruling the objection of said defendant to the introduction of any evidence in said cause, to which ruling of the court said defendant then and there excepted and its exception was allowed.

3. That said court erred in admitting incompetent, irrelevent [irrelevant] and immaterial testimony and evidence on

behalf of the plaintiff over the objections of this defendant, to which in each instance this defendant then and there duly excepted and its exceptions were allowed.

4. That among other evidences, so admitted by the court over the objection and exception of this defendant, said court erroneously admitted testimony and evidence offered to show that this defendant by some act other than in writing, waived the proof of loss or sworn statement relating to the loss required to be furnished by plaintiff under the terms of the written policy of insurance sued upon by plaintiff herein, to which action of the court the defendant at the time excepted and its exception was allowed.

5. That the court erred in rejecting competent, relevant and material testimony and evidence offered on behalf of this defendant, to which action of the court this defendant then and there duly excepted and its exceptions were allowed.

6. Errors of law occurring during the trial of said cause, to which this defendant duly excepted and its exceptions were allowed.

7. That said court erred in overruling the demurrer of this defendant to the evidence of the plaintiff, to which this defendant duly excepted at the time and its exception was allowed.

8. Error of the court in overruling and denying the motion and request of this defendant for an instruction by the court to the jury to return a verdict in favor of this defendant made at the close of all of the evidence in said cause, to which ruling of the court this defendant duly excepted at the time, and its exception was allowed.

[fol. 113] 9. Errors of the court in giving to the jury those portions of the court's charge numbered 1, 2, 3, 4, 5, 6, and 7, and to those other portions of the charge to the jury to which this defendant specifically excepted at the time, and each of its said exceptions were by the court allowed.

10. That the court erred in the charge of the court to the jury in stating that it was the theory of this defendant that by reason of the plaintiff's having failed to furnish the sworn statement or proof of loss required by the terms

of the policy contract, the plaintiff had forfeited all of its right under such policy, to which the defendant duly excepted at the time and its exceptions were allowed.

11. That the court erred in the charge of the court to the jury in that in said charge, the court invaded the province of the jury, as specifically called to the attention of the court in the exceptions of this defendant to the charge of the court and the different portions thereof.

12. That the verdict of the jury in said cause is not supported by any evidence and is contrary to the evidence and contrary to law, to which verdict and the receiving, filing and recording of same this defendant duly excepted at the time and its exception was allowed.

13. That the court erred in rendering the judgment upon said verdict and in said cause against this defendant for the reason that said judgment is not supported by any evidence, is contrary to the evidence and is contrary to law.

14. That the court erred in rendering judgment against this defendant for interest upon the amount of said judgment from May 2, 1926, for the reason that said portion of said judgment is contrary to law, there being no provision in the policy or contract of insurance sued upon by plaintiff herein whereby it was either expressly or impliedly agreed that interest should be paid, and the claim of plaintiff in this cause being an unliquidated claim which could not be liquidated by mere calculation and required the verdict of the jury or the judgment of the court to determine the amount of same.

Wherefore, defendant prays that the court grant a new trial in said cause.

H. C. Thurman, Attorney for Defendant.

[File endorsement omitted.]

[fol. 114] In United States District Court

No. 3481 Law

Motion for New Trial—Filed Jan. 19, 1929

Comes now the defendant, Royal Insurance Company, Ltd., a corporation, by its attorneys, Rittenhouse, Lee,

Webster & Rittenhouse, and moves the court to vacate and set aside the verdict and judgment and to grant a new trial in the above entitled cause upon the following grounds and for the following reasons which affect materially the substantial rights of this defendant:

1. That the court erred in overruling the demurrer of said defendant to the amended petition of the plaintiff, to which ruling of the court this defendant then and there excepted and its exception was allowed.

2. That said court erred in overruling the objection of said defendant to the introduction of any evidence in said cause, to which ruling of the court said defendant then and there excepted and its exception was allowed.

3. That said court erred in admitting incompetent, irrelevant and immaterial testimony and evidence on behalf of the plaintiff over the objection of this defendant, to which in each instance this defendant then and there duly excepted and its exceptions were allowed.

4. That among other evidence so admitted by the court over the objection and exception of this defendant, said court erroneously admitted testimony and evidence offered to show that this defendant by some act other than in writing, waived the proof of loss or sworn statement relating to the loss required to be furnished by plaintiff under the terms of the written policy of insurance sued upon by plaintiff herein, to which action of the court the defendant at the time excepted and its exception was allowed.

5. That the court erred in rejecting competent, relevant and material testimony and evidence offered on behalf of this defendant, to which action of the court this defendant then and there duly excepted and its exceptions were allowed.

6. Errors of law occurring during the trial of said cause, to which this defendant duly excepted and its exceptions were allowed.

7. That said court erred in overruling the demurrer of this defendant to the evidence of the plaintiff, to which

this defendant duly excepted at the time and its exception was allowed.

[fol. 115] 8. Error of the court in overruling and denying the motion and request of this defendant for an instruction by the court to the jury to return a verdict in favor of this defendant made at the close of all of the evidence in said cause, to which ruling of the court this defendant duly excepted at the time, and its exception was allowed.

9. Errors of the court in giving to the jury those portions of the court's charge numbered 1, 2, 3, 4, 5, 6 and 7, and to those other portions of the charge to the jury to which this defendant specifically excepted at the time, and each of its said exceptions were by the court allowed.

10. That the court erred in the charge of the court to the jury in stating that it was the theory of this defendant that by reason of the plaintiff's having failed to furnish the sworn statement or proof of loss required by the terms of the policy contract, the plaintiff had forfeited all of its rights under such policy, to which this defendant duly excepted at the time and its exceptions were allowed.

11. That the court erred in the charge of the court to the jury in that in said charge, the court invaded the province of the jury, as specifically called to the attention of the court in the exceptions of this defendant to the charge of the court and the different portions thereof.

12. That the verdict of the jury in said cause is not supported by any evidence and is contrary to the evidence and contrary to law, to which verdict and the receiving, filing and recording of same this defendant duly excepted at the time and its exception was allowed.

13. That the court erred in rendering the judgment upon said verdict and in said cause against this defendant for the reason that said judgment is not supported by any evidence, is contrary to the evidence and is contrary to law.

14. That the court erred in rendering judgment against this defendant for interest upon the amount of said judgment from May 2, 1926, for the reason that said portion

of said judgment is contrary to law, there being no provision in the policy or contract of insurance sued upon by plaintiff herein whereby it was either expressly or impliedly agreed that interest should be paid, and the claim of plaintiff in this cause being an unliquidated claim which could not be liquidated by mere calculation and required the verdict of the jury or the judgment of the court to determine the amount of same.

[fol. 116] Wherefore defendant prays that the court grant a new trial in said cause.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

Service of a copy of the within and foregoing motion for new trial is hereby acknowledged to have been made upon us this 19th day of January, 1929..

Rainey, Flynn, Green & Anderson, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

No. 3482. Law

Motion for New Trial—Filed Jan. 19, 1929

Comes now the defendant, National Fire Insurance Company, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and moves the court to vacate and set aside the verdict and judgment and to grant a new trial in the above entitled cause upon the following grounds and for the following reasons which affect materially the substantial rights of this defendant:

1. That the court erred in overruling the demurrer of said defendant to the amended petition of the plaintiff, to which ruling of the court this defendant then and there excepted and its exception was allowed.

2. Said court erred in overruling the objection of said defendant to the introduction of any evidence in said cause, to which ruling of the court said defendant then and there excepted and its exception was allowed.

3. That said court erred in admitting incompetent, irrelevant and immaterial testimony and evidence on behalf of the plaintiff over the objection of this defendant, to which in each instance this defendant then and there duly excepted and its exceptions were allowed.

4. That among other evidence so admitted by the court over the objection and exception of this defendant, said court erroneously admitted testimony and evidence offered to show that this defendant by some act other than in writing, waived the proof of loss or sworn statement relating to the loss required to be furnished by plaintiff under the terms of the written policy of insurance sued upon by plain-
[fol. 117] tiff herein, to which action of the court the defendant at the time excepted and its exception was allowed.

5. That the court erred in rejecting competent, relevant and material testimony and evidence offered on behalf of this defendant, to which action of the court this defendant then and there duly excepted and its exceptions were allowed.

6. Errors of law occurring during the trial of said cause, to which this defendant duly excepted and its exceptions were allowed.

7. That said court erred in overruling the demurrer of this defendant to the evidence of the plaintiff, to which this defendant duly excepted at the time and its exception was allowed.

8. Error of the court in overruling and denying the motion and request of this defendant for an instruction by the court to the jury to return a verdict in favor of this defendant made at the close of all of the evidence in said cause, to which ruling of the court this defendant duly excepted at the time, and its exception was allowed.

9. Errors of the court in giving to the jury those portions of the court's charge numbered 1, 2, 3, 4, 5, 6 and 7, and to those other portions of the charge to the jury to

which this defendant specifically excepted at the time and each of its said exceptions were by the court allowed.

10. That the court erred in the charge of the court to the jury in stating that it was the theory of this defendant that by reason of the plaintiff's having failed to furnish the sworn statement or proof of loss required by the terms of the policy contract, the plaintiff had forfeited all of its rights under such policy, to which this defendant duly excepted at the time and its exceptions were allowed.

11. That the court erred in the charge of the court to the jury in that in said charge, the court invaded the province of the jury, as specifically called to the attention of the court in the exceptions of this defendant to the charge of the court and the different portions thereof.

12. That the verdict of the jury in said cause is not supported by any evidence and is contrary to the evidence and contrary to law, to which verdict and the receiving, filing and recording of same this defendant duly excepted at the time and its exception was allowed.

13. That the court erred in rendering the judgment upon said verdict and in said cause against this defendant for [fol. 118] the reason that said judgment is not supported by any evidence, is contrary to the evidence and is contrary to law.

14. That the court erred in rendering judgment against this defendant for interest upon the amount of said judgment from May 2, 1926, for the reason that said portion of said judgment is contrary to law, there being no provision in the policy or contract of insurance sued upon by plaintiff herein whereby it was either expressly or impliedly agreed that interest should be paid, and the claim of plaintiff in this cause being an unliquidated claim which could not be liquidated by mere calculation and required the verdict of the jury or the judgment of the court to determine the amount of same.

Wherefore defendant prays that the court grant a new trial in said cause.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

Service of a copy of the within and foregoing motion for new trial is hereby acknowledged to have been made upon us this 19th day of January, 1929.

Rainey, Flynn, Green & Anderson, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

No. 3483. Law

Motion for New Trial.—Filed Jan. 19, 1929

Comes now the defendant, Fire Association of Philadelphia, a corporation, by its attorneys, Rittenhouse, Lee, Webster & Rittenhouse, and moves the court to vacate and set aside the verdict and judgment and to grant a new trial in the above entitled cause upon the following grounds and for the following reasons which affect materially the substantial rights of this defendant:

1. That the court erred in overruling the demurrer of said defendant to the amended petition of the plaintiff, to which ruling of the court this defendant then and there excepted and its exception was allowed.

2. That said court erred in overruling the objection of said defendant to the introduction of any evidence in said [fol. 119] cause, to which ruling of the court said defendant then and there excepted and its exception was allowed.

3. That said court erred in admitting incompetent, irrelevant and immaterial testimony and evidence on behalf of the plaintiff over the objection of this defendant, to which in each instance this defendant then and there duly excepted and its exceptions were allowed.

4. That among other evidence so admitted by the court over the objection and exception of this defendant, said court erroneously admitted testimony and evidence offered to show that this defendant by some act other than in writing, waived the proof of loss or sworn statement relating to the loss required to be furnished by plaintiff under the

terms of the written policy of insurance sued upon by plaintiff herein, to which action of the court the defendant at the time excepted and its exception was allowed.

5. That the court erred in rejecting competent, relevant and material testimony and evidence offered in behalf of this defendant, to which action of the court this defendant then and there duly excepted and its exceptions were allowed.

6. Errors of law occurring during the trial of said cause, to which this defendant duly excepted and its exceptions were allowed.

7. That said court erred in overruling the demurrer of this defendant to the evidence of the plaintiff, to which this defendant duly excepted and its exceptions were allowed.

8. Error of the court in overruling and denying the motion and request of this defendant for an instruction by the court to the jury to return a verdict in favor of this defendant made at the close of all of the evidence in said cause, to which ruling of the court this defendant duly excepted at the time and its exception was allowed.

9. Errors of the court in giving to the jury those portions of the court's charge numbered 1, 2, 3, 4, 5, 6 and 7, and to those other portions of the charge to the jury to which this defendant specifically excepted at the time, and each of its said exceptions were by the court allowed.

10. That the court erred in the charge of the court to the jury in stating that it was the theory of this defendant that by reason of the plaintiff's having failed to furnish the sworn statement or proof of loss required by the terms of the policy contract, the plaintiff had forfeited all of its [fol. 120] rights under such policy, to which this defendant duly excepted at the time and its exceptions were allowed.

11. That the court erred in the charge of the court to the jury in that in said charge, the court invaded the province of the jury, as specifically called to the attention of the court in the exception of this defendant to the charge of the court and the different portions thereof.

12. That the verdict of the jury in said cause is not supported by any evidence and is contrary to the evidence and

contrary to law, to which verdict and the receiving, filing and recording of same this defendant duly excepted at the time and its exception was allowed.

13. That the court erred in rendering the judgment upon said verdict and in said cause against this defendant for the reason that said judgment is not supported by any evidence, is contrary to the evidence and is contrary to law.

14. That the court erred in rendering judgment against this defendant for interest upon the amount of said judgment from May 2, 1926, for the reason that said portion of said judgment is contrary to law, there being no provision in the policy or contract of insurance sued upon by plaintiff herein whereby it was either expressly or impliedly agreed that interest should be paid, and the claim of plaintiff in this cause being an unliquidated claim which could not be liquidated by mere calculation and required the verdict of the jury or the judgment of the court to determine the amount of same.

Wherefore, defendant prays that the court grant a new trial in said cause.

Rittenhouse, Lee, Webster & Rittenhouse, Attorneys for Defendant.

Service of a copy of the within and foregoing motion for new trial is hereby acknowledged to have been made upon us this 19th day of January, 1929.

Rainey, Flynn, Green & Anderson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 121] In United States District Court

Order, February 20, 1929, Overruling Motions for New Trial

(Before Judge Vaught)

On this 20th day of February, 1929, the plaintiff appears by Messrs. Rainey, Flynn, Green & Anderson, its attorneys,

the defendant Concordia Insurance Co. of Milwaukee by H. C. Thurman, Esq., its attorney, and the defendants, Royal Insurance Company, National Fire Insurance Company, and Fire Association of Philadelphia, by Messrs. Rittenhouse, Lee, Webster & Rittenhouse, their attorneys. Thereupon, each of the above styled and numbered cases comes on for hearing upon the motions of the defendants for a new trial, arguments of counsel are heard thereon, and the Court being duly advised in the premises, it is ordered that each of said motions be and they are overruled and exceptions allowed each of the defendants. The defendants each give notice of appeal in open court, and ask and are granted sixty (60) days from this date in which to file bill of exceptions herein.

No. 3473. Law

In United States District Court

Orders Extending Time to File Bill of Exceptions—Filed Apr. 8, 1929

It is this day ordered, for good cause shown, that the said defendant be and it is allowed until May first, 1929, in which to present and file his bill of exceptions in said cause.

April 8th, 1929.

Edgar S. Vaught, District Judge.

[File endorsements omitted.]

No. 3481

It is this day ordered, for good cause shown, that the said defendant be and it is allowed until May first, 1929, in which to present and file his bill of exceptions in said cause.

April 8th, 1929.

Edgar S. Vaught, District Judge.

[fols. 122-124] No. 3482. Law

It is this day ordered, for good cause shown, that the said defendant be and it is allowed until May first, 1929, in which to present and file its bill of exceptions in said cause.

April 8th, 1929.

Edgar S. Vaught, District Judge.

No. 3483. Law

It is this day ordered, for good cause shown, that the said defendant be and he is allowed until May first, 1929, in which to present and file his bill of exceptions in said cause.

April 8th, 1929.

Edgar S. Vaught, U. S. District Judge.

[fol. 125] In United States District Court

Bill of Exceptions—Filed April 20, 1929

Caption

Now on this 14th day of January, 1929, the above entitled and numbered causes being consolidated for the purposes of trial, come on to be heard at the regular January, 1929 term of said court at Oklahoma City, Oklahoma, before Honorable Edgar S. Vaught, Judge, and a jury.

Appearances:

Rainey, Flynn, Anderson & Green by Frank G. Anderson, Esq., and Streeter Flynn, Esq., for the plaintiff.

Rittenhouse, Lee, Webster and Rittenhouse, by F. A. Rittenhouse, Esq., and Frank Lee, Esq., and Ross and Thurman by Hal C. Thurman, Esq., for the defendants.

Thereupon both sides announcing ready for trial, a jury is empaneled and sworn to try the cases according to the law and the evidence, and the following proceedings were had as follows:

Thereupon, the opening statements were made by counsel for the respective parties, and the following evidence was introduced as follows to-wit:

V. I. Langston was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. State your name.

A. V. I. Langston.

Mr. Rittenhouse: We would like to have the jury excused for a moment. We have a proposition of law we would

like to argue which I think is decisive of the whole question.

By the Court: Very well, gentlemen of the jury, you may be excused from the court room until you are called.

(Thereupon the jury was given the usual admonition by the Court, and excused from the court room during the argument.)

DEFENDANTS' OBJECTIONS AND DEMURRER TO EVIDENCE

Mr. Rittenhouse: Now, comes the defendants and each of them and object to the introduction of evidence, and demur to the introduction of evidence on the ground and for the reason, first, that the original petition in this action, and the first amended petition show on their faces that the action was prematurely brought, and as set forth in the original [fol. 126] petition, and that the first amended petition was not filed until after the running of the statute of limitations. Second: That the petition in this case wholly fails to state a cause of action, and shows upon its face that no proof of loss was filed within the sixty day period provided in each of said policies, or at any other time within the statute of limitations, or up to and including this date.

(Thereupon, the matter was argued by counsel.)

By the Court: Overruled and exception allowed to each of the defendants.

Thereupon court adjourned until 1:30 P. M. this day, at which time court reconvened, and all parties being present as heretofore, the trial of the above and foregoing entitled cause was resumed, and further proceedings had therein as follows, to wit:

Proceedings, 1:30 o'clock P. M.

V. I. LANGSTON, was thereupon called as a witness on behalf of the plaintiffs and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name?
A. V. I. Langston.

Q Are you a member of the school board of District 36, Payne County?

A I am.

Q What position do you hold on the board?

A Clerk.

Q How long have you been on the board?

A I am serving my fourth year on the board as clerk.

Q You have been clerk all the time you have been on the board?

A Yes, sir.

Q Do you recall having the school building and contents insured in the fall of 1925?

A I do.

Q Who were the local agents of the insurance companies that issued these policies?

A [illegible] Charles Morris and W. A. Northcraft of Yale.

Q What companies did they represent?

A Mr. Northcraft represented the Royal Insurance Company and the other agents I am not so sure which companies they represented, but one of them was the Fire Association of Philadelphia, and one of the companies was the Concordia, and I forget the name of the other company.

Q To refresh your recollection I will ask you if it was the National Fire Insurance Company.

A I believe that is right.

Q Did you make a request of these agents as to how much insurance should be written on the school property?

Mr. Lee: Object to that as incompetent, irrelevant and immaterial. The execution of the policies has been admitted and it would not be material as to what these agents might or might not have done with reference to issuing the property.

By the Court: Yes, I think.

Mr. Anderson: It is merely preliminary.

A Before the old petition expired the board at one of its meetings discussed renewing the insurance and it was decided to [illegible]

Mr. Lee: Object to that as incompetent, irrelevant and immaterial.

By Mr Anderson

Q Do you know whether or not they made any examination of the school building before these policies were written?

Mr Law Object to that as incompetent, irrelevant and immaterial

By the Court Overruled

Mr Law Exception

A I have no direct knowledge of them inspecting the property, no direct knowledge that is personal knowledge I didn't see them there myself

Q These policies were issued, were they?

A Yes sir

Q And the school board paid the premium on each of those policies?

A Yes sir

Q That occurred about when?

A In October, 1925. Those policies were dated, I believe October 25, 1925

Q Was that school building later burned?

A Yes sir

Q When?

A The morning of January 2, 1926

Q About what time in the morning?

A I believe the fire was first discovered about fifteen minutes after five in the morning

Q Did you go over there any time to see the fire?

A Yes sir, I arrived at the building about five o'clock

Q What if anything did you do after that with reference to advising the insurance companies and whom?

A Well, about eight o'clock that morning the another member of the board and myself went to Vale and notified Mr Hall and Mr Sloan and Mr Nottingham and Charley Morris, I think was notified over the telephone

Q Was he one of the local agents?

A At that time he was

Q That issued one of the policies?

A Yes, sir

Mr Thurman The defendants move to strike the suggestion of the witness as to what he did about notification over the telephone

By the Court: Well, it is preliminary. Overruled.
Mr. Thurman: Exception.

By Mr. Anderson:

Q. I show you an instrument which has been marked Plaintiff's Exhibit 1, and ask you if that is the policy that was issued by the Royal Insurance Company?
A. Yes, sir.

Mr. Anderson: We now offer in evidence Plaintiff's Exhibit 1.
By the Court: Let it be received.
Mr. Anderson: May it be agreed that the other policies are in the same form, the policies issued by the other company.
Mr. Thurman: It is stipulated between the plaintiff and the Concordia Fire Insurance Company that Plaintiff's Exhibit 1, so far as the form containing the provisions of the policy is concerned, is the same as the policy issued by the Concordia Fire Insurance Company, and that it may be considered in evidence as to the Concordia Fire Insur- [fol. 129] ance Company as supplemented by Plaintiff's Exhibit 2 which containes [contains] the information inserted in the standard form of policy which was inserted in the policy issued by the Concordia Fire Insurance Company.
By the Court: That covers the amount, does it?
Mr. Thurman: Well, it covers the description of the property and the amount of insurance on each particular part of the property in accordance with the terms and conditions included in the standard form of policy of which Plaintiff's Exhibit 1 is a copy.

(Thereupon, Plaintiff's Exhibit 1 was received in evidence, and is as follows:)
(Plaintiff's Exhibit No. 1, standard form of insurance policy covering schools, printed herewith as Exhibit A to petition in state case No. 3481, School District No. 98, etc. vs. Royal Insurance company.)

Mr. Anderson: We offer in evidence Plaintiff's Exhibit 2.
By the Court: It will be admitted.

(Thereupon Plaintiff's Exhibit 2 was received in evidence, and is as follows:)

PLAINTIFF'S EXHIBIT NUMBER TWO

No. 18814. EX-FR-MR-MAP-ENT

Daily Report

In renewal or in place of No. —. Class: —.

This Risk is in Vol. No. —, Sheet No. —, Block No. —, St. No. —.

The Concordia Fire Insurance Co. of Milwaukee, Wisconsin

Rate of Commission on this Risk is — %. From Okla. City, Okla. The E. Braniff Co. Agency.

Amount, $25,000.00. Rate, Bldgs. 1. 25-0. 75, Cts. 1. 45-0. 75. Premium, $310.43.

Three Hundred Ten and 43/100 Dollars Premium.

Assured School District No. 98, Payne County, Oklahoma. Term One Year. From the 24th day of October, 1925, at noon, to the 24th day of October, 1926, at noon.

Against loss or damage by fire. Amount, Twenty-Five Thousand and No/100 Dollars.

[fol. 130] School Form. Form No. 166

Uniform Standard, Oklahoma

This policy, being for $25,000.00, covers its pro rata proportion of each of the following Amounts:

*1 $67,000 on the Three story composition tile roof brick school building, including foundations, plumbing, electric wiring and stationary heating, lighting and ventilating apparatus and fixtures therein; also all permanent fixtures including pipe organ, fixed seats, desks, railings, altars, clocks, bells and stained glass windows, belonging to and constituting a permanent part of said building; only while occupied for school pur-

* No insurance attaches under any of the above items unless a certain amount is certified and inserted in blank immediately preceding the item.

poses, with privilege of occasional public meetings, and situated NE Corner of NE 4 Section 1, Township 18, Range 5, of Payne County, State of Oklahoma. This insurance shall also cover under this item, if the property of owner of building, door and window screens and storm doors and windows, belonging to above described building, while attached thereto or stored there.

*2 $3,400 on movable furniture and fixtures of every description, useful and ornamental; maps, library and supply of books and stationery; mirrors, pictures, paintings, engravings, including their frames, statuary and sculpture, all at not exceeding cost; laboratory supplies and equipment; scientific supplies and equipment; manual training machinery, supplies and equipment; gymnasium supplies and equipment; piano and other musical instruments (excluding organ with operating motor); stage scenery and equipment; movable heating apparatus, electrical apparatus, appliances and devices; fuel and provisions; and all other articles and apparatus as are usually contained in school buildings; all not belonging to and constituting a permanent part of the building and only while contained in the above described building.

$2,500 on frame, shingle roof, Teacherage on above premises.

300 on furniture and fixtures while in Teacherage,

300 on frame shingle roof garage in rear of Teacherage.

1,000 on brick building used as Power Plant on above premises.

500 on machinery in Power Plant.

$75,000.00 Total.

---

* No insurance attaches under any of the above items unless a certain amount is certified and inserted in blank immediately preceding the item.

[fol. 131] Other insurance permitted; provided, however, if a Three-fourths Value Clause is attached to this policy, this permit is made subject to all the conditions of said Three-fourths Value Clause.

Alterations and Repairs Permit

(This clause void when attached to Tornado Policy)

Permission granted for mechanics to be employed for more than fifteen (15) days in making alterations, improvements and repairs to any building herein described, and in construction additions or sheds which attach to and communicate with such building, and the insurance, if any hereunder, on such building is hereby made to cover such alterations, improvements, repairs, attached and communicating additions and sheds, also building materials and supplies therefor, while contained therein or on the premises immediately adjacent thereto; and the insurance, if any hereunder, on contents of any building herein described is hereby made to cover in such attached and communicating additions and sheds to said building; but any change in a fire wall, the removing or replacing of the joists or supports of a floor, or the construction of additional stories to any building herein described, when mechanics are employed for such purposes for more than fifteen (15) days at any one time, shall not be permitted by this policy unless specifically included by endorsement attached hereto.

Permission granted to use electricity for light, heat and power in the premises described in this policy.

Caution.—See that the entire electric equipment is installed and maintained in full compliance with the standard requirements of the National Electrical Code, copy of which may be obtained of your insurance agent.

Permission granted to use artificial or natural gas for fuel or light in the premises described in this policy, only when supplied through public service gas pipes, subject to the following conditions:

1. This company will not be liable for any damage by explosion of artificial or natural gas unless fire ensues and then for damage by fire only, and under a fire policy only.

NOTE.—The term "premises," as used in this permit, means only the building (or buildings) described in this policy, or such portions of same as are occupied by the insured.

This policy does not cover on moving picture and films (unless specified herein).

[fol. 132] The use of Moving Picture Machines is prohibited (under fire policies) unless special permit is endorsed hereon.

It is a condition of this insurance that attached awnings and radio equipment on the outside of the building are not covered when this form is attached to a tornado policy.

Gasoline Stove Permit

Subject *ot* [to] the following conditions, permission is granted to use gasoline stoves in the premises desc*ir*bed [described] in this policy.

The conditions of this permit, in so far as they are within control of the insured, are as follows:

1. That the filling, emptying, or opening of the reservoir of a gasoline stove shall be done by daylight or incandescent electric light only, and when the stove is not in use; and that there shall be no other artificial light and no fire or blaze in the room where and when such reservoir is being filled or emptied, or open.

2. That, unless otherwise permitted by endorsement hereon no gasoline in excess of ten (10) gallons (which shall be kept in a tight and entirely closed metal can, free from leak), except that contained in the reservoir of a gasoline stove, shall be kept or used in the premises described in this policy.

3. The term "gasoline" shall be held to include naphtha, benzine, or any of the light products of petroleum, coal or tar, by whatever name known.

NOTE.—The term premises as used in this permit, means only the building (or buildings) described in this policy or such portions of same as are occupied by the insured.

NOTE.—The granting of the above permits does not waive any schedule charge therefor.

Lightning and Electrical Exemption or Dynamo Clauses

(These clauses void when attached to Tornado Policy)

Lightning Clause.—Except as provided in the Electrical Exemption or Dynamo Clause below, this policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy, provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with other insurance for any direct loss by lightning, [fol. 133] whether such other insurance be against direct loss by lightning or not.

Electrical Exemption or Dynamo Clause.—If dynamos, exciters, lamps, motors, switches or other electrical appliances or devices are covered under this policy, this company shall not be liable for any electrical injury or disturbance, whether from artificial or natural causes, unless fire ensues, and then only for such loss or damage to them as may be caused by such ensuing fire; this limitation to be operative notwithstanding any provision to the contrary in the lightning clause attached.

Vacancy Condition

This policy continues in full force and effect during vacations between school terms, and at times as school is not actuall [actually] in session, provided that, if this form is attached to a fire policy and the building is abandoned for school purposes for an indefinite period without written permission hereon, then this policy shall be void.

Attached to and forming part of Policy No. 18814 of the Concordia Fire Insurance Company issued at its Oklahoma City, Oklahoma, Agency. Dated October 22nd, 1925.

—— ——, Agent.

Important: Notice to Agents.—This form may be used on Fire or Tornado policies. Agents are cautioned, in either

case, to attach to policy the Three-fourths Value Clause, the Exposure Clause, or Co-Insurance Clause, as called for in Book of Rules issued by the Oklahoma Inspection Bureau.

Endorsement

Form No. 60

Uniform Standard, Oklahoma

Agency at Oklahoma City, Oklahoma. Policy No. 18814. Concordia Fire Insurance Company of Milwaukee, Wis. This Space for Home Office Use. Inv. No. 25422, Oct. 28, 1925. Z. F.

Name of Assured School District: #98, Payne County, Okla.

Location of property: ——.

[fol. 134] City or Town: ——

Tariff No.: ——. Map No.: ——.

Property Insured: ——. (State whether building, machinery, stock, etc., and whether specific or blanket. If specific, state amount on each item, if more than one.

Clauses—Co-insurance: ——. (State what % and items to which the clause applies.) Pro rata: ——. (Answer "Yes" of [or] "No."

Date of Policy: —— —, ——. Expiration: —— —, ——. Amount: $——.

Old rate: ——. New rate: Average, 1.28. Return Premium: $0.43.

Additional premium: $——.

An average rate having been promulgated on the property covered by this policy, a return premium of $0.43 is hereby allowed the assured. Average rate is $1.28.

Answer all questions on reverse side.

Date of endorsement: October 28th, 1925.

—— ——, Agent.

In consideration of $— waived extra premium, permission is granted to use a moving picture machine in the premises described i nthis policy for a period of 365 days, from Oct. 24th, 1925, at noon to Oct. 24th, 1926, at noon, but said machine is not insured under this policy.

Attached to and forming part of Policy No. 18814 of the Concordia Fire Insurance Company issued at its Oklahoma City, Oklahoma agency. Dated October 22nd, 1925.

—— ——, Agent.

NOTE.—In all cases where machine is used regularly, specific rate must be applied for.

Gas Permit No. 2

Artificial or Natural (Explosion Hazard)

Permission granted to use artificial or natural gas for fuel or light in the premises described in this policy only when supplied through Public Service gas pipes; and in consideration of $10.00 extra premium, this policy shall cover loss or damage to the property described herein, caused by explosion therein of artificial or natural gas when, and only when, used or supplied for fuel or lighting [fol. 135] purposes, whether fire ensues or not, provided, that for the purpose of contribution all other insurance on the property described in this policy shall be treated as covering the hazard of explosion in like manner with this company, and it is a condition of this insurance that this company shall be liable for only such proportion of said loss or damage as the amount hereby insured bears to the whole amount to fire insurance and for explosion insurance on said property.

NOTE.—The term "premises," as used in this permit means only the building (or buildings) described in this policy.

Attached to and forming part of policy No. 18814 of the Concordia Fire Insurance Company issued at its Oklahoma City, Oklahoma agency. Dated Oct. 22nd, 1925.

NOTE.—The attachment of this permit does not waive any schedule charge therefor.

Approved 10-22-25.

Queried Agt. —— —, ——.

Ordered Cancelled —— —, ——.

Recommended New Lme $2,500.
Reinsure $22,500 Western #301.
The T. E. Brainiff Company, by L.H.W., Examiner.

Issued through the office of the T. E. Brainiff Company, Insurance Specialists.

Mr. Lee: If the Court please, as to the defendant National Fire Insurance Company, it appears in the answer of the National Fire Insurance Company, that it is alleged that the amount of insurance under its policy on the furniture of the plaintiff was $908.89, which appears to be an error; either a clerical error or merely a miscalculation. That amount should be $1133.33, and we would like for the answer to be considered as amended at this time to allege the correct amount. It apparently got in there through clerical error.

By the Court: Let the amendment be so understood.

By Mr. Anderson:

Q. I will ask you whether or not after this fire any of the adjustors came to see you concerning the loss?

A. They did.

[fol. 136] Q. About when?

A. About ten days after the fire or along about the 10th or 12th, I would say, of January.

Q. Who came to see you?

A. Mr. Guy Fuller and Mr. Kline.

Q. What Mr. Kline was that?

A. I believe it was George W. Kline or G. W. Kline.

Q. Did any other adjustor come that day to see you?

A. That same day, I believe it was Mr. Mullen, I believe his name is Lloyd Mullen.

Q. Of this city?

A. I understand he was with the Brainiff Company of this city.

Q. Did Mr. Fuller and Mr. Kline have any conversation with you on that trip?

A. They did.

Q. Where did it occur?

A. In the office where I was employed.

Q. Where was that with reference to this school property?

A. About a mile away.

Q. Do you know whether or not they made any inspection concerning the fire while they were there?

A. I don't know——

Mr. Lee: Object to that as incompetent, irrelevant and immaterial.

By the Court: Overruled.

Mr. Lee: Exception.

Q. What was your answer?

A. I understood that they had come by the ruins——

Mr. Lee: We object to what he understood.

A. They said this to me.

By Mr. Anderson:

Q. They told you they did?

A. Yes, sir.

Mr. Thurman: We object to that and move that it be stricken for the reason any statement or declaration of a purported agent is not admissible as binding on the principal.

By the Court: Overruled.

Mr. Thurman: Exception.

A. Mr. Fuller came to the office and introduced himself and opened the conversation with reference to our insur-
[fol. 137] ance and said they had drove by the place and had saw the result of the fire.

Q. It that the Mr. Fuller that sits over there?

A. Yes, sir, Mr. Guy H. Fuller, and Mr. Fuller asked me on that visit if I had an inventory of the equipment that burned, and our records were all destroyed that we had in the building when it burned. I told Mr. Fuller I had no inventory of the equipment, but I would make an effort to get it for them, and that morning on that occasion he instructed me to furnish him a list of the moveable equipment in the building, and at that time he said he would run the plans and specifications down.

Q. What plans and specifications?

[fol. 137]

A He had reference to the plans and specifications of the building that was destroyed.

Q Did he ask you to furnish him anything else?

A Not at that time.

Q Did you furnish him that list of the moveable equipment?

A Yes, sir.

Q I show you an instrument marked Plaintiff's Exhibit 3 and ask you what that is.

A That is a list I furnished on January 20 to the Fuller Adjustment Company, attention of Mr. Guy H. Fuller.

Q Is that a carbon copy of your letter which contains the list?

A Yes, sir.

Mr. Anderson: With consent of counsel for the defendant I am using this now as the original instead of the original itself, and offer Plaintiff's Exhibit 3 in evidence.

Mr. Love: To which the defendants and each of them object as incompetent, irrelevant and immaterial, not within the issues in the case and not binding on the defendants or either of them.

Mr. Anderson: I understand it is not on the ground it is not the original?

Mr. Love: No, we are not objecting on that ground that it is not the original instrument itself.

By the Court: Overruled.

Mr. Thurman: Exception.

By Mr. Anderson:

Q. How did you send this to Mr. Fuller?

A. Through the mail.

[fol. 138] (Thereupon Plaintiff's Exhibit No. 3 was received in evidence and is as follows:)

3

PLAINTIFF'S EXHIBIT NUMBER THREE

(Letter, Clerk of Board to Fuller Adjustment Company)

January 20th, 1926.

The Fuller Adjustment Co., 215 Mercantile Bldg., Oklahoma City.

GENTLEMEN:

Attention: Mr. Guy E. Fuller re: Norfolk School loss by fire, Dist. #98.

As per your request, I am giving you below a report of the cost of movable furniture, supplies, etc. lost in our recent fire, same being obtained from the records of the County Superintendent's office and the County Treasurer's office, at Stillwater, Okla.:

Date	Warrant No.	Payee	Amt	For
11-18-18	10	Jasper Sipes Company	$208.75	Misel. Equip.
6-10-19	77	The Croller Society	56.00	Books.
12-24-20	112	Western Book Co.	48.50	Books.
3-7-21	128	Western Book Co.	78.12	Books.
4-8-21	139a	Western Book Co.	112.88	Books.
10-12-22	7	Liberty Pharmacy	200.00	Bruns. Phon'gh.
10-28-22	14	W. M. Welch & Co.	302.00	Hi. Sch. Equip.
10-28-22	15	Arlington Supply Co.	233.82	" " "
10-9-22	40	E. M. Frost	250.00	Furniture.
1-27-23	65	" " "	61.75	Bk. Case.
4-3-23	85	Arlington Supply Co.	65.22	Maps.
5-19-23	96	E. M. Frost	112.00	Bks.
12-12-23	178	Jasper Sipes Co.	270.00	Sch. Furn.
3-18-24	215	J. D. Barnes	190.58	Bks.
11-21-24	29	Jasper Sipes Co.	88.00	Type. Table.
11-21-24		Singer Machine Co.	127.48	3 Mach.
11-21-24	85	L. L. Hitt	4.50	Stepladder.
11-21-24	52	Jasper Sipes Co.	202.00	Sch. Supplies.
12-20-24	63	" " "	116.10	Misel.
1-20-25	77	Underwood Type. Co.	210.00	3 Type.
5-8-25	122	Peter Helw. & Fur.	4.50	Pic. Frames.
5-15-25	128	Smith Bellis Co.	43.50	Pictures.
6-15-25	142	Fry Fyter Co.	72.00	Fire Ex.
9-29-25	1	P. E. Perswell Co.	226.06	Band Instru.
10-1-25	7	Colonial Art. Co.	6.00	2 Pictures.
10-5-25	30	Fredc Kickson-Kroh.	133.65	Band Instru.
10-5-25	31	Peabody Sch. Fur. Co.	84.43	File Cab.
10-5-25	32	P. E. Perswell	26.40	Music Sup.
10-5-25	47	Shepard Map & Sup. Co.	152.00	Charts & Maps.
10-20-25	50	Zimmerman & Bennett	616.10	Band Instru.
11-27-25	65	Jasper Sipes Bk. Co.	90.32	Books.
11-27-25	70	Metrop. Sch. Sup. Co.	57.82	Chairs (Frt.)
11-27-25	72	Loke & Campbell	131.27	Ath. Suits.
11-27-25	74	Okla. Bk. Co.	25.80	Bks.
		Total	$4,825.85	

[fol. 139] We have billes [bills] in the amount of approximately $300.00 for Band Instuments [Instruments], Books, etc., which are at this time unpaid, which were lost in the fire. The district also lost their piano which was purchased just prior the ending of fiscal year June 30th, 1917, which does not appear in the above report. The actual cost of this piano can be determined by the records of the County Superintendent's office if necessary, but my understanding at this time the cost was between $500.00 and $600.00.

A summary of the cost of the mavable [movable] furniture, equipment, etc., would be as follows:

Total Cost as per above report	$4,825.85
Bills for material lost in fire but unpaid	300.00(est.)
Cost of Piano (not included in above)	500.00(est).
Grand total cost	$5,625.85

Yours very truly,

——, ——, Clerk of Board.

cc. Enclosed for Mr. Kline.

Q. I show you Plaintiff's Exhibit No. 4 and ask you what that is.

A. It seems to be a letter from Mr. Fuller, from the Fuller Adjustment Company acknowledging receipt of this letter in which I gave a list of the movable equipment.

Q. Did you receive that through the mail?

A. Yes, sir.

Mr. Anderson: I now offer in evidence Plaintiff's Exhibit No. 4.

Mr. Lee: The defendants and each of them object to the introduction of Exhibit No. 4 for the reason the same is irrelevant, incompetent and immaterial and not within the issues in the case, and not binding upon either of the defendants.

By the Court: Overruled.

Mr. Lee: Exception.

Mr. Anderson: I take it you don't object because I have not proven Mr. Fuller's signature to this letter. I am merely asking that to save time.

Mr. Lee: No, we don't object to that.

(Thereupon Plaintiff's Exhibit No. 4 was received in evidence, and is as follows:)

[fol. 140] PLAINTIFF'S EXHIBIT 4

(Letter, Fuller Adjustment Company to Clerk of Board)

The Fuller Adjustment Company

Oklahoma City, 215 Merc. Bldg., Guy E. Fuller, Mgr.

Phones: Local (W 6890, (W 6891; L. D. 205

Tulsa, Oklahoma, 213 Atco. Bldg., L. M. Hallock, Mgr.

Phones: Local 3-2065; L. D. 123

Oklahoma City, Oklahoma, January 26, 1926.

Mr. V. I. Langston, Clerk School District No. 98, Payne County, Yale, Oklahoma.

DEAR SIR: We have your favor of the 20th inst., inclosing a schedule of fixtures in the school building as obtained by you from the records of the County Superintendent, and the County Treasurer of Stillwater, Oklahoma, and desire to thank you for this information.

Insofar as the building is concerned, we find ourselves in a position that is going to require more information before a definite replacement value can be established. We have, as you know, nothing but the plans of the building, and this is hardly sufficient for a contractor to make an intelligent estimate from. What we desire to have before figuring the value is the specifications, showing the character of construction, both in the old building and in the new. Will you not kindly make inquiry among the present members of the Board and see if such specifications cannot be found.

In case we cannot obtain detail specifications, it is going to be necessary for us to obtain this information, if possible, from other sources, and would ask that in case you cannot furnish the specifications, kindly furnish us with the name of some party who is in a position to advise us definitely as to the character of construction of both of the buildings.

If you can do this, we will immediately have our contractor get in touch with such party, and after obtaining the

[fol. 141] necessary information, prepare an estimate for the replacement of the property.

Thanking you for your kindness in this matter, we are,

Yours very truly, Fuller Adjustment Company, by Guy E. Fuller.

GFF/m.

Q. Mr. Langston, I show you Plaintiff's Exhibit No. 5 and ask you to state what that is.

A. That is a letter I wrote to Mr. Guy H. Fuller under date of January 30, advising that I was mailing him under separate cover the specifications——

Q. That is the letter from you to Mr. Fuller?

A. Yes, sir.

Mr. Anderson: I now offer in evidence Plaintiff's Exhibit No. 5.

Mr. Lee: To which the defendants and each of them object for the reason the same is incompetent, irrelevant and immaterial and not within the issues in the case and not binding upon either of the defendants.

By the Court: Overruled.

Mr. Lee: Exception.

Mr. Anderson: Let the record show counsel for the defendants say the original was received.

By the Court: I didn't understand you.

Mr. Anderson: Let the record show the counsel for the defendants say the original copy was received.

Mr. Thurman: We couldn't find it but it was received by Mr. Fuller and defendants make no objection on the ground that the carbon copy is offered in evidence.

(Thereupon Plaintiff's Exhibit No. 5 was received in evidence and is as follows:)

PLAINTIFF'S EXHIBIT NUMBER 5

(Letter, Clerk of Board of Guy H. Fuller)

Yale, Oklahoma, Jan. 30th, 1926.

Mr. Guy H. Fuller, Mgr. the Fuller Adjustment Co., Oklahoma City, Oklahoma.

DEAR SIR: Two or three days back, I mailed you a carbon [fol. 142] copy of a letter written to Mr. W. H. Fisher,

relative to the specifications of the addition to our school building, constructed in the year 1922. To-day I received the specifications from Mr. Fisher, which I am forwarding to you under separate cover.

Will you kindly acknowledge receipt of the specifications, and oblige,

Yours very truly, —— ——, Clerk of Board.

Q. I now show you Plaintiff's Exhibit No. 6 and ask you to state briefly what that it.

A. Acknowledging receipt of the specifications.

Q. That is the letter from Mr. Fuller of the Fuller Adjustment Company?

A. Yes, sir.

Mr. Anderson: I now offer in evidence Plaintiff's Exhibit No. 6.

Mr. Lee: To which the defendants and each of them object as incompetent, irrelevant and immaterial and not within the issues in the case and not binding upon either of the defendants.

By the Court: Overruled.

Mr. Lee: Exception.

(Thereupon Plaintiff's Exhibit No. 6 was received in evidence and is as follows:)

(Plaintiff's Exhibit No. 6, letter dated Feb. 3, 1926, to V. Langston from Fuller Adjustment Company, printed herewith as Exhibit A to first amended petition in state case No. 3473, School District No. 98, etc. vs. Concordia Insurance Company.)

By Mr. Anderson:

Q. Did Mr. Cableman referred to in that letter come to see you?

Mr. Thurman: The defendants object as incompetent, irrelevant and immaterial and it does not tend to prove any issue in this law suit.

By the Court: Overruled.

Mr. Thurman: Exception.

A. He came to the location of the burned building.

Q. Did you see him while there?

A. Yes, sir.

[fol. 143] Q. And talk to him?

A. No, sir.

Q. Did he make any investigation of what was left of that building?

Mr. Thurman: Defendant objects as incompetent, irrelevant and immaterial and does not tend to prove any issue in this case, any act or any statement of Mr. Cableman could not be binding upon these defendants, the only inference being that he received some delegation of authority from somebody else who was purported to act as an agent and an agent cannot employ another agent unless specially authorized.

By the Court: Overruled. This is a preliminary question. He doesn't ask for any statement but he asks what he did.

Mr. Thurman: The defendants except.

A. All I could tell you, he viewed the ruins of the old building and asked some questions as to the building, and some of the material perhaps and some of the equipment that was attached to the building and some of the fixtures.

Q. You talked to him while he was there?

A. Yes, sir.

Mr. Thurman: The defendants move to strike the answer of the witness for the same reason given in the objection to the question.

By the Court: Overruled.

Mr. Thurman: Exception.

By Mr. Anderson:

Q. I show you Plaintiff's Exhibit 7 and ask you to state briefly what that is.

A. That is a list of equipment that was considered to be a part of the building because of it being attached to the floor, ceiling, walls and so forth.

Q. Is that a copy of the original?

A. Yes, sir.

Q. What was done with the original?

A. It was mailed to the Fuller Adjustment Company.

Mr. Anderson: I now offer in evidence Plaintiff's Exhibit No. 7.

Mr. Lee: To which the defendants and each of them object as incompetent, irrelevant and immaterial and not [fol. 144] within the issues in this case and not binding upon the defendants or either of them.

By the Court: Overruled.

Mr. Lee: Exception.

(Thereupon Plaintiff's Exhibit No. 7 was received in evidence and is as follows:)

PLAINTIFF'S EXHIBIT NUMBER SEVEN

(Letter to Fuller Adjustment Company, Signed "Clerk")

Yale, Okla., Feb. 8th, 1926.

The Fuller Adjustment Co., 215 Mercantile Bldg., Oklahoma City.

GENTLEMEN:

Attention Mr. Guy H. Fuller, Mgr.

Yesterday, we met and talked with Mr. Kebelman. In a general discussion as to the loss of the building and equipment, Mr. Kebelman suggested that I furnish you with a report as to the fixtures and equipment we had, permanently fastened to and forming a part of the building. I have hurriedly gone thru some of my records and am giving you a general idea as to the equipment we had. However, this report does not include all and is separate and distinct from that I furnished you in a report of January 20th, as in that report the equipment mentioned was described as being movable.

Date	Warrant No.	Favor	Amt.	For
10-20-20	92	R. C. Wright.....	$178.58	Fixtures.
10-20-20	93	W. H. Prather.....	381.00	(Fixtures (Lum. & Labor)
10-27-20	98	E. E. Silvernall.....	65.04	"
3-17-21	133	Peter Hwd. & Fur...	15.95	Locks
2- 4-22	38	Yale Eliectric Co....	22.90	Fixtures.
6-15-23	105	Peter Hwd. & Fur...	119.05	Fixtures.
10-26-23	145	George Wise.....	126.00	Stove & Cup.
11- 3-23	154	Gas Steam Rad. Co..	500.00	Radiators.
11- 3-23	155	Gas Steam Rad. Co..	500.00	"
11- 3-23	156	" " " " ..	500.00	"
11- 3-23	157	" " " " ..	500.00	"
11- 9-23	160	R. C. Wright.....	480.00	Plmbing

Date	Warrant No.	Favor	Amt.	For
4-11-24	232	Gas Steam Rad. Co..	1,113.38	Heat. Fix.
11-21-24	30	Jasper Sipes Co.....	442.00	Chemical Tab.
6-26-25	150	R. C. Wright.....	465.00	Install. Toilet
6-25-25	149*	Southern Theatre Equip.	100.00	Minusa Screen
10- 5-25	33	Mitchell Elec. Co....	7.20	Elec. Bulbs.
11-27-25	64	Jasper Sipes Co.....	25.92	Blk. Boards.
11-27-25	66	R. C. Wright.....	214.00	Shower Baths.
		Total	$5,656.02	

* The amount of this warrant was something over $600.00 which also inclueded [included] the purchase of a moving picture machine which I understand is not covered by insurance. The cost of the screen, however, was $100.00.

Yours very truly, —— ——, Clerk.

[fol. 145] By Mr. Anderson:

Q. Where did you get any understanding that the moving picture machine you mentioned was not covered by insurance?

Mr. Lee: Defendants object to that as incompetent, irrelevant and immaterial and not binding upon either of the defendants.

Mr. Anderson: We have a right to explain his statement, I think, your Honor.

By the Court: Yes, but that would be a conclusion on his part.

Mr. Anderson: Did your Honor overrule the objection?

By the Court: Sustain the objection.

Mr. Anderson: The reason I asked, he mentioned in the latter part of this letter that he understood it was not covered by the insurance. Now, I don't think that is the fact, and I wanted to clear up that statement in that letter.

By the Court: I didn't hear that part of the letter you read. I didn't know there was any reference to that.

Mr. Lee: It doesn't make any difference.

By the Court: No, I don't think so, as to where he got it.

Mr. Anderson: I don't think it makes any difference as to what his understanding was either.

By the Court: No.

Mr. Lee: Just to clear up that question, if the Court please, and especially to prevent the wrong impression

from counsel's remark, the policy form does specifically in bold type exclude coverage or [on] picture machines and films. That is in the policy and policies do not cover those things. I say that just to call attention to it so that no false impression will be made here on that ground. It is on the form attached to the policy, the long form, I think, of coverage.

By Mr. Anderson:

Q. Mr. Langston, did Mr. Fuller and the other adjustors [fol. 146] you have mentioned have a meeting with your school board after this fire?

A. Yes, sir.

Q. About when?

A. It was about the 27th day of February; the latter part of February?

Q. That was after this correspondence which was introduced in evidence?

A. I think that is right, yes, sir.

Q. Who was at that meeting?

A. The Board was there including myself and Mr. Quigley and Mr. Edge. Mr. Edge.

Q. Who else was there?

A. Mr. Fuller, Mr. Kline, Mr. Lloyd Mullen, Mr. Cableman and our superintendent, P. E. Percival and there was a gentleman from Cushing there, a Mr. Montgomery and I think Mrs. Percival was also present. I don't know whether she was in the room during the meeting or not but she was with the superintendent, I think.

Q. Where was that meeting held?

A. It was in a building provided for a superintendent's home on the school grounds.

Q. What, if anything, was said between these adjustors and your school board at that meeting?

Mr. Lee: The defendants and each of them object for the reason the same is incompetent, irrelevant and immaterial and not binding on these defendants or either of them and not within the issues and an attempt to vary the terms and provisions of a written contract by parole testimony.

By the Court: Overruled.

Mr. Lee: Exception.

A. These insurance adjustors, at first, they sat themselves around a table and made some calculations, I suppose, looked as though they were figuring on things and pretty soon Mr. Fuller, I believe it was, asked Mr. Cableman if he had the figures ready to present for the cost of rebuilding and replacing this building, and Mr. Cableman replied that he did, and he gave them to the insurance adjustors, and I can't give you the exact amount that he said the building could be replaced for, but as near as I remember he stated that the building could be replaced for approximately $55,000, and after they took off a certain [fol. 147] amount of depreciation I think the offer that was made was something like $53,000, and so we felt like——

Mr. Lee: We object to that as a conclusion of the witness.

By the Court: Yes, don't state what you felt like.

Mr. Lee: And as to the offer that was made, he is not stating who said this or anything of the kind, and it is a conclusion of his. It does not appear to be either the actual conversation or substantially the conversation which took place, and does not purport to name the person who spoke.

By the Court: I don't recall the latter part of that, but it will be necessary for you to state who made this statement now that you are talking about when you refer to the adjustors. Give the name of the one speaking.

A. Well, Mr. Fuller did the talking, practically all the talking for the insurance adjustors, and Mr. Cableman, as I said before, the building could be replaced for practically $55,000, I can't remember the exact figure, and after taking off depreciation Mr. Fuller made an offer of approximately $53,000.

Mr. Lee: We object to that as a conclusion of the witness, and incompetent, irrelevant and immaterial and not binding upon the defendants or either of them.

By the Court: Overruled.

Mr. Lee: Exception.

By the Court: I will state now that this testimony is admitted for one purpose only, and that will be covered by proper instruction to the jury.

A. And Mr. Fuller made that offer to the Board but we did not accept that offer. We did not know——

Mr. Lee: We renew our objection as the testimony of the witness is a statement of his conclusion from what was said

or purported to have been said, instead of stating the conversation that took place, and is incompetent, irrelevant and immaterial and hearsay and not binding upon these defendants or either of them.

By the Court: The objection will be sustained insofar as the witness failed to state who did the talking.

Mr. Thurman: May I call your Honor's attention to just one matter, the witness has said an offer was made. That is a conclusion pure and simple. What was said by Mr. [fol. 148] Fuller may have appeared to the witness to have been an offer, but it might not appear to your Honor or the jury as an offer at all.

By the Court: I didn't understand the objection was directed to the use of that particular word.

Mr. Thurman: That is the sole——

By the Court: That will be sustained. Don't say that an offer was made but use the words Mr. Fuller used as nearly as you can.

Mr. Anderson: Let me ask you this——

Mr. Lee: In order that we may have the record clear the defendants and each of them move that the testimony of the witness with reference to any offer made be stricken as incompetent, irrelevant and immaterial and a conclusion of the witness.

By the Court: Sustained.

By the Court: I want you, however, to cover that particular ground. Go ahead and ask the questions.

Mr. Anderson: I understand that went to the offer?

Mr. Lee: Yes, sir.

Mr. Anderson: I am going to start you where you left off with the conversation with Mr. Cableman [Kebelman].

By Mr. Anderson:

Q. Did Mr. Fuller submit anything to the board in writing at that meeting?

A. Yes, sir.

Q. In what form was it and on what was it?

A. He submitted figures on a printed form. That is, he had made figures on a printed form and handed them to some of the Board members.

Q. I will ask you if you know whether or not that was made up there in the presence of the school board at that meeting.

A. As near as I know it was.

Q. Did he sign that?

A. I can't be positive about that but I think his signature was on it.

Q. Just tell this jury what was done with that particular written instrument.

A. Well, it was laid back on the table and I don't know—I think——

[fol. 149] Q. I am talking about what finally became of it. After he put down those figures what did he do with it?

A. He handed it to the nearest—the man sitting nearest to him, which was Mr. Percival, our superintendent.

Q. What happened to it then?

A. Mr. Percival handed it to Mr. Quigley.

Q. Mr. Quigley was a member of the board?

A. Yes, sir.

Q. Did Mr. Percival and Mr. Quigley look at those figures?

A. Yes, sir.

Q. Then what was *was* done with it?

A. I think it was placed back on the table.

Q. Did you look at that?

A. I just saw them, I think, in the hands of one of the other parties.

Q. Then it was placed back on the table right there in the room in that meeting?

A. Yes, sir.

Q. Then what was done with it?

A. I think Mr. Fuller put it in his brief case or traveling bag.

Q. I will ask you whether or not you recognize that as being the same instrument about which you are testifying?

A. It doesn't occur to me it is. That was a printed form, as well as I recall, that he handed to those men.

Q. Now tell this jury what was said by Mr. Fuller, if anything further was said.

A. Well, I couldn't tell that——

Q. And what was said by members of the board.

A. J. E. Quigley, or myself, asked Mr. Fuller this: "Do you consider Mr. Cableman [Kebelman] a competent and efficient contractor?", to which Mr. Fuller said, "If I hadn't

we wouldn't have had him figure the cost of the building or replacing this building. Then either Mr. Quigley, myself or Mr. Edge, said to him, "Now, Mr. Fuller, in the policy you reserve the right to rebuild or replace. Mr. Cableman [Kebelman] says he can put this building back like it was for approximately $55,000. We do not know Mr. Cableman [Kebelman], so you contract with him. You exercise the right you reserve in your policy, you contract with Mr. Cableman [Kebelman] and let him put this building back like it was, and you have the board satisfied; the fact of the matter is that is what we would like to [fol. 150] have you do, Mr. Fuller." And he made some reference as to having been in the business over thirty years and had never done business that way and never expected to.

Q. Did Mr. Fuller at that meeting say anything to the Board as to the amount of loss on the movable furniture?

A. If my memory serves me correctly, he said there is no question about the $3400 on the movable equipment that we were really under-insured on that.

Q. Everything that was said by Mr. Fuller, was that said in the presence of the other two adjustors?

A. They were all present.

By the Court:

Q. What did Mr. Fuller say, if anything, with reference to the loss after Mr. Cableman [Kebelman] made the report to him; something you testified to awhile ago?

A. I don't know that I understand your question.

By the Court:

Q. What did Mr. Fuller say, if anything as to the amount of your loss on that building?

A. If I understand your question, there was a statement made that we were over-insured, if that is what you want——

By the Court:

Q. Is that all that was said?

A. That is all I recall.

By the Court:

Q. Did he state any amount at all?

A. The only amount that was talked about was the amount of our policies.

By the Court:

Q. What I am trying to get at, you said offer, that was objected to and will be stricken. I don't want you to use the word offer. State what he said.

A. If my memory is correct he made that as an offer.

By the Court: I don't want you to use the word offer.

Mr. Thurman: I move to strike that again, if the Court please.

By the Court: Sustained.

By the Court:

Q. State what he said

A. That has been over three years ago and I can't tell you the exact words Mr. Fuller used, but it was to the effect we will pay you $53,000, or approximately that amount on the building.

Mr. Lee: We object to that and ask it be stricken as incompetent, irrelevant and immaterial and a conclusion of [fol. 151] the witness and not binding upon the defendants or either of them.

By the Court: Overruled.

Mr. Lee: Exception.

By Mr. Anderson:

Q. Did they ask you for any further information as to the loss at the time of that meeting, that is referring to these adjustors?

Mr. Lee: Object to that as incompetent, irrelevant and immaterial.

Mr. Anderson: I think that is competent, your Honor.

By the Court: Overruled.

Mr. Lee: Exception.

A. I don't recall any communication with Mr. Fuller or anyone else connected with the insurance company after that meeting.

By Mr. Anderson:

Q. At that meeting did they ask you for any further proof as to the loss?

A. No, sir.

Q. I show you Plaintiff's Exhibit 8, and ask you to state briefly what that is, but not stating the contents.

A. That is a letter it seems to be from Mr. Fuller with regard to our insurance case, insurance on the building.

Mr. Anderson: We now offer in evidence plaintiff's Exhibit No. 8.

Mr. Lee: To which the defendants object as incompetent, irrelevant and immaterial and not within the issues in the case and not binding upon either of the defendants.

By the Court:

Q. Where did you get that letter?

By Mr. Anderson:

Q. When did you first see this letter?

A. I believe right now—no, I take it back—I saw that letter, I think this is the letter that was read at the annual school board meeting last Tuesday in March following our fire in January.

By the Court:

Q. Is that Mr. Fuller's signature to it?

A. If that is the letter I have in mind. Maybe I better read that more carefully. (Witness reads letter.) That is it.

[fol. 152] Mr. Anderson: Is there any question about Mr. Fuller's signature on that, Mr. Lee?

Mr. Lee: No question about the signature.

By the Court: Overruled.

Mr. Lee: Exception.

(Thereupon Plaintiff's Exhibit 8 was received in evidence, and is as follows:)

PLAINTIFF'S EXHIBIT NUMBER EIGHT

(Letter, Fuller Adjustment Company to Trustees)

The Fuller Adjustment Company

Oklahoma City, 215 Merc. Bldg., Guy H. Fuller, Mgr.

Phones: W. 6890, W. 689-; L. D. 205

Tulsa, Oklahoma, 213 Atco Bldg., L. M. Hallock, Mgr.

Phones: 3-2060; L. D. 123

Oklahoma City, Oklahoma, March 24, 1926.

Trustees School District No. 98, Yale, Oklahoma.

GENTLEMEN: In reference to claim for loss and damage to school building and contents from fire alleged to have occurred under date of January 2nd, 1926, at 5 A. M., beg to confirm the offer of settlement which was made to you at the time of meeting of the adjuster and the Board at Norfolk, Oklahoma.

Our offer of settlement was based on an estimate of reconstruction cost of the building proper, such estimate being furnished by Mr. Frank Kebelman of Oklahoma City in the amount of $53,360.00. Such estimate was based on the plans and specifications as furnished by your board, and pertains to that portion of the property designated as building proper including everything except the permanent fixtures installed therein. Such estimate was in the amount of $53,-360.00. From this, we made a deduction on account of depreciation in the amount of $2668.00, or a net sound value of the building under date of January 2nd, 1926, of $50,-692.00. To this in the nature of permanent fixtures, according to the list submitted, was added the sum of $1717.76, this being on a depreciated basis for the permanent fixtures, or a total of $52,409.76, which in our judgment, represents [fol. 153] the sound value of the building proper and the permanent fixtures attached thereto, on January 2nd, 1926.

You had insurance upon movable fixtures in the amount of $3,399.99, which amount is insufficient to pay the total value of this character of property, but the amount as stated is the limit and the companies cannot make payment in excess of that amount.

With this item added to the building proper, it would make a total amount of $55,809.75 as the amount, in our opinion which represents the actual sound value of the property under date of January 2nd, 1926, and the greatest amount for which the interested companies could in any event be held liable.

We have endeavored to be fair in the consideration of this claim—going to the expense of procuring the services of one of the most competent contractors in Oklahoma City, to give us a correct reconstruction cost of the building, and we certainly feel that the figures as presented are in actual keeping with the reconstruction cost of the property and the sound value thereof.

We have no desire to be unfair in this matter, and we do not like to have it stand open indefinitely, but if you will advise us prior to April 1st, 1926 that this offer of settlement will be satisfactory, we will immediately submit proofs to the interested companies in the amount as set forth herein.

Kindly let us know as early a date as possible and not later than the date specified.

Yours truly, Fuller Adjustment Company, by Guy H. Fuller.

GHF/M.

Cross-examination.

By Mr. Lee:

Q. Now, you say that someone by the name of Fuller and someone by the name of Kline came to your office about ten days after the fire?

A. Yes, sir, I am real positive about Mr. Fuller but I am not altogether as positive about Mr. Kline, but I am sure in my own mind it was Kline.

Q. And they asked you to furnish a list of the movable furniture?

A. They asked me for an inventory of the movable equipment, yes, sir.

Q. And you said that you would furnish that?

[fol. 154] A. Yes, sir, I would make an effort to.

Q. What was it they said about the plans and specifications?

A. Mr. Fuller says, "You furnish us the inventory on the equipment and we will run down the plans and specifications." I think that was his exact words; that was in effect what he said.

Q. Had he been told anything about the plans and specifications by you before that?

A. Yes, sir.

Q. What?

A. I told him that I didn't have them. He asked me for them and I told him I didn't have the plans and specifications.

Q. Now, later on you did get the plans and specifications, did you?

A. I got the specifications. I believe someone else made the plans. I believe this correspondence states specifications.

Q. You got the specifications for this building afterwards?

A. I got them for the addition to the building; the specifications for the addition to the building.

Q. What did that addition consist of?

A. It consisted of a story over the structure that was added onto the original building that was constructed prior to that time. That is, the original building was constructed in 1917, and then in 1923 there was an addition put on it, and the specifications I secured pertained to the addition.

Q. What size was the old original building?

A. I don't know.

Q. What size was the old original building?

A. I can't say exactly, but I think it was 56 feet by 56 feet.

Q. Now you say that addition was built in 1923?

A. Started in 1923. It appears it was not completed until early in 1924.

Q. You are positive?

A. Sir?

Q. You are positive about that?

A. That is my best judgment upon it.

Q. Now, what about the materials used in the old building, were they the same as those used in the addition? That is, the same kind of material?

A. I don't think they were.

Q. What is the difference, if any?

[fol. 155] A. Different kind of brick.

Q. Well, what was the difference in the kinds of brick, if you know?

A. I am not a brick man, I am sure I couldn't tell you the difference.

Q. Well, do you know which was the more expensive?

A. No, sir, I couldn't tell you that. I could give you my opinion but I don't think you want that.

Q. No, I want what you know.

A. I don't know.

Q. Now, you didn't furnish any specifications on the old building, you say?

A. I wasn't able to secure any myself, no sir.

Q. Did you try?

A. I made an effort.

Q. What effort did you make?

A. I asked some of the people around there who had been living there quite a while and I think I wrote to two or three parties asking them if they knew where they might be obtained.

Q. Two or three parties. Do you mean that you didn't even have a record as to who built that building?

A. I wasn't there when the original building was constructed.

Q. Wasn't there a record in your office, among your records as clerk of that school district of the building of that old original building?

A. There were but they were burned in the fire. Every record we had at the time of that fire was in the building that burned. I don't know that the records were there, but if they were they burned.

Q. You say you couldn't find out in that neighborhood who had constructed that old building?

A. I don't know positively. I have no direct knowledge. I can tell you who I was told.

Q. Were you told at that time who had built it?

A. My understanding was——

Q. Just answer me yes or no.

Q. What was the question?

Q. Were you told at that time when you were making inquiry, trying to find the specifications, were you told who built the old part of the building?

[fol. 156] A. No, sir, I already had the information, all that I had at that time.

Q. And you say you were unable to find those plans and specifications?

A. I never was able to get in my possession any specifications on the original building.

Q. And you never did furnish specifications on the original building?

A. I did not, no, sir.

Q. Did any of the rest of you to your knowledge?

A. No, sir.

Q. Now, who was it that had the specifications on this addition?

A. I think I secured them from Mr. W. H. Fisher; Ward H. Fisher.

Q. Who is he, do you know?

A. I don't know. I just know Mr. Fisher, that is all.

Q. Is he the man who designed and drew up the plans and specifications for the new part of the building?

A. That is my understanding.

Q. Were you a clerk of the school board at that time?

A. No, sir.

Q. That addition had been completed before you became clerk?

A. Yes, sir.

Q. Do you know where you addressed Mr. Ward H. Fisher?

A. Oklahoma City, Oklahoma.

Q. Do you remember whether he had any special title after his name or before it designating his business or calling?

A. I don't recall what it was, if any.

Q. Now, you say that you had a conversation with Mr. Fuller the latter part of February, 1926, when the members of the school board, Mr. Fuller, Mr. Kline and Mr. Mullen and some others were present?

A. Yes, sir.

Q. Now at that time just tell the court and jury again what was said and who said it, please.

A. Well, we met the men and went into this front room where we held our meeting on the teacherage or superintendent's home. In order to do that I want to tell you what transpired just before any conversation started, if I may. They seated themselves around the table and they [fol. 157] had some papers on the table before them, and were making calculations of some kind, and finally Mr. Fuller said t Mr. Cableman [Kebelman], who was sitting there, he said, "Mr. Cableman [Kebelman], have you your figures ready or prepared for the cost of rebuilding this building?" And Mr. Cableman [Kebelman] replied that he did, and Mr. Fuller asked for them. He said, "Let me have them." Mr. Cableman [Kebelman] took them from his brief case or traveling bag, whatever he had with him, and handed them to Mr. Fuller, and Mr. Kline and Mr. Mullen and Mr. Cableman [Kebelman] talked about these figures, and Mr. Fuller said, "Now, we will pay approximately $53,000," allow that much, as well as I recall, on the building, and Mr. Fuller stated at that meeting that we were under-insured on the equipment, that is to the amount of $3,400, and one of the members asked Mr. Fuller the question if he considered Mr. Cableman [Kebelman] a capable contractor and he said if he hadn't considered him such he wouldn't have had him down there and we said, Mr. Quigley or myself or Mr. Edge one said to Mr. Fuller, "Well, now you know Mr. Cableman [Kebelman], we don't know him. He is a stranger to us and you go ahead and contract with Mr. Cableman [Kebelman] to put up this building like it was and the board will be satisfied. You reserve the right in the policy to do that; if you can do that for ten thousand dollars, just put it back like it was, we are satisfied," and Mr. Fuller then made the answer something about having been in business for thirty years or more and he had never done business that way and never expected to, and that was about the substance of the conversation that took place.

Q. Let me ask you this: Did Mr. Fuller say this or this in substance: After he had submitted these figures amounting to $55,000 or $56,000, somewhere in that neighborhood as a total amount, did he say this or this in substance to you members of the school board: If you are willing to accept that much we will take proofs and submit them to the company?

A. I don't recall that.

Q. Do you recall whether or not he said that or that in substance?

A. I wouldn't say that he did or didn't. I don't remember any such statement.

Q. As a matter of fact, Mr. Fuller didn't say "we will pay you so much" but he said "we will take proofs for that much," didn't he?

A. I understood him to say he would pay us that much.

Q. You understood him to say he would pay us that much?

[fol. 158] A. Anyhow, whatever he said that is the meaning I took it.

Q. Now, you can't remember whether or not he said that they would take proofs for that much and submit them to the company?

A. I don't recall any such statement being made. I wouldn't say he made it or that he didn't make it, but I don't think he did.

Q. Now you stated that you had detailed here on the witness stand also the conversation?

A. About all of it. There might have been some more—No, no doubt there were other things said, but I don't recall just what they might have been.

Q. Who was present there when Mr. Fuller made that statement which you construed to be an offer of payment?

A. Mr. Kline and Mr. Mullen, Mr. Cableman [Kebelman], myself, Mr. Edge, J. E. Quigley, Mr. Percival. That is about all I remember being in the room at that time.

Q. And you think you have stated all of the substance of the conversation that took place at that time?

A. I believe that is about what covered the insurance proposition, as near as I recall.

Q. Now, prior to that time you say you had submitted by mail to the Fuller Adjustment Company, attention Mr. Guy H. Fuller, an itemized list of the movable furniture and fixtures, and also an itemized list of the permanent fixtures and furniture. That is the part attached to the building?

A. Yes, sir, I obtained them from the records at Stillwater.

Q. Now you had also submitted the specifications on the new part of the building?

A. They were submitted.

Q. You had submitted them?

A. I mailed them to Mr. Fuller.

Q. Now, what had you submitted them to Mr. Fuller or any of the other adjustors with reference to the rest of that building?

A. I don't know that there was anything submitted that pertained to the rest of the building unless it would be the detailed drawing of the addition. That showed in a way the general outline of the original building because the addition was put onto the original building.

Q. But it didn't show anything about materials?

[fol. 159] A. I don't know just what the plans did show.

Q. The only thing you furnished about the building was the specifications for the addition to the building, wasn't it, whatever they were?

A. Yes, sir.

Q. And you furnished no figures on the old building, did you?

A. I didn't, no sir.

Q. And you didn't know of any being furnished, did you?

A. No, I don't believe I had any knowledge of any on the original building.

Q. And so when you had this big talk there, the latter part of February, when all of you were present, the only figures you had were the figures on the movable furniture, the figures on the permanent fixtures and the figures on the new addition, wasn't it?

A. Well, I don't know that we had—yes, I guess we had given the specifications on the new addition too. I don't know whether that was before this meeting or not. I guess it was, though.

Q. But in any event you had no more than those figures, had you?

A. The plans and specifications and these two lists.

Q. This?

A. I won't say there was no more. I don't recall right now any other.

Q. You know you didn't furnish any more, don't you?

A. I wouldn't say I knew that either. I might have.

Q. Didn't you state a minute ago these were all that was furnished?

A. To the best of my knowledge.

Q. To the best of your knowledge?

A. And recollection.

Q. They were all that were furnished by the Board, weren't they?

A. That is according to my memory at this time.

Q. Well, the only figures that were considered at this conference there where you say Mr. Fuller offered the settlement, were the figures on the movable fixtures, the permanent fixtures, the new addition to the building and Cableman's [Kebelman's] figures on all of it, weren't they?

A. That is my understanding that he had submitted this [fol. 160] figure to cover the rebuilding of the building. Now, whether his figures covered the equipment, I don't know.

Q. Did any of the board say anything at that time about Cableman's [Kebelman's] figures not being right?

A. Only just what we outlined in that conversation. The statement was made that we were over insured, and someone of the board, I think it was the opinion of all of us, or all three members of the board we were not over insured.

Q. Did you name any figures besides Cableman's [Kebelman's] figures as being the correct figures as to the sound value of that property?

A. I don't recall. It may have been there was a figure mentioned. I don't recall whether it was or not.

Q. You don't recall mentioning any yourself, do you?

A. I think I mentioned that the property cost approximately $80,000 or $90,000; between eighty and ninety thousand dollars. I don't know whether I mentioned it right there at that meeting or not.

Q. Let's not go into suppositions. What did you say at that meeting with reference to the value of that property?

A. I don't remember what I said, if anything.

Q. Now, along in March, about the 24th of March, you received a letter from Mr. Fuller, you say?

A. No, sir, I didn't receive that letter.

Q. You didn't?

A. No, sir.

Q. This Plaintiff's Exhibit 8?

A. I didn't receive the letter.

Q. You saw it sometime in March at the school board meeting?

A. Yes, sir.

Q. It was discussed there at that time, wasn't it?

A. This letter was read.

Q. You noticed in that letter, did you not, at that time, or in the reading of it, that Mr. Fuller wrote: "We have no desire to be unfair in this matter, and we do not like to have it stand open indefinitely, but if you will advise us prior to April 1, 1926, that this offer of settlement will be satisfactory we will immediately submit proof to the interested companies in the amount as set forth herein." You remember reading that over, don't you?

[fol. 161] A. That was the letter that was read and that, no doubt, was read with the rest of it.

Q. You knew at that time that your board had not submitted any proof to these companies, didn't you?

A. We had submitted all the proofs they asked us to.

Q. You knew at that time that your board had not submitted any sworn statements to the companies?

A. We made no sworn statement, no. I didn't. I did everything that Mr. Fuller asked me to do.

Q. You didn't fix up any proofs after you received this letter, did you?

A. No, sir. I can tell you the reason why, if you want me to.

Q. Mr. Fuller never did tell you not to submit any proofs, did he?

A. No, sir, he didn't tell me not to submit any information I might have, no, sir.

Q. He never did tell you not to submit him sworn statements showing the amount of this loss and the different items thereof, did he?

A. No, sir.

Q. You say that at the time you held this discussion there the latter part of February that you had the plans and specifications for the new part of the building which gave a kind of an indefinite outline of the old part of the building, you had the lists of the furniture and fixtures, both movable and permanent, and you had Mr. Cableman's [Kebelman's] figures. Is that right.

A. Mr. Cableman's [Kebelman's] figures were submitted to us through Mr. Fuller. Of course, we heard Mr. Cableman [Kebelman] state to Mr. Fuller his figures and then Mr. Fuller gave them to us.

Q. And you had furnished these other matters, these two lists and specifications for the new part of the building?

A. Yes, sir, I furnished these lists from records I was able to get at Stillwater, and specifications.

Q. You are positive of that?

A. Yes, sir.

Q. Isn't it a fact you didn't have even the plans and specifications for the new part of that building at that time?

A. No, sir, I secured the- from Ward Fisher, the specifications. I didn't secure the plans.

Q. When did you secure those specifications?

[fol. 162] A. I don't know the exact date. I wrote Mr. Fisher asking him if he had them and he wrote back and answered me and he later sent me these specifications.

Q. And that was after this big conference you say you had in the latter part of February that you sent those specifications for the first time to Mr. Fuller? Wasn't it?

A. You say after this?

Q. Yes, sir.

A. I don't recall it was. It seems to me it was before this meeting that I got these specifications from Mr. Fisher.

By the Court: The letter says January.

A. Before the February 27th meeting.

By Mr. Lee:

Q. Now, in any event you had only plans and specifications for the new part of the building?

A. I believe that is all I ever saw.

Q. Now, was anything said about Mr. Cableman's [Kebelman's] ability as a contractor there at that meeting?

A. Yes, sir.

Q. What was said?

A. Mr. Fuller said he was very competent and efficient. In substance he said that, we asked him if he considered him competent and efficient and he said he did.

Q. Did Mr. Cableman [Kebelman] make any proposition to the school board at that time?

A. He said he could put that building back for that amount of money, the amount of money he said it could be replaced for.

Q. Did he say anything else?

A. Well, that is about all; he said he could put it back for that amount of money.

Q. He told you members of the school board that he could replace that building for about $5500 [$55,000], didn't he?

A. Something like that.

Q. Now, I will ask you this, didn't he also say to you that he was ready to enter into a contract and give a bond?

A. I believe there was something said about it, yes, sir.

Q. You think he said that?

A. I think there was a proposition of that kind made. I think he said he would be able to make bond.

Q. I will ask you this: Didn't Mr. Cableman [Kebelman] as a matter of fact offer the school board a bond at that [fol. 163] time, a bid bond not to exceed the amount he said he would replace it for?

A. I think he said that.

Q. And didn't he have a bid bond there?

A. I don't recall that.

Q. Already executed and exhibited it to you?

A. I don't recall that.

Q. You don't say that he didn't do that, do you?

A. *No, sir, I don't say that.*

By the Court:

Q. You stated a moment ago in answer to one of the questions that you could state why you hadn't filed a formal proof of loss. Why hadn't you?

A. At this school board meeting the last Tuesday in March, 1926, this letter was read and there was some discussion by some of the patrons of the school district, which was at the annual school meeting, and there was a motion made there——

By the Court:

Q. Were any of these defendants present?

A. I don't know that there was at this school meeting.

By the Court: It would not be competent for you to state anything that occurred unless they were present.

A. These insurance adjusters?

By the Court: Yes, sir.

A. I was going to tell you why we didn't.

By the Court: It wouldn't be competent unless your reason was brought to their attention at the time.

Redirect examination.

By Mr. Anderson:

Q. I believe you say all your records burned at the time of the fire.

A. All that were in the school building.

Q. Did your insurance policies also burn, with the exception of this one here?

A. Yes, sir, with the exception of this one here.

Q. Do you know why it happened to be with the others?

A. I happened to have it at my house, my home.

Q. Now, this list that you sent to Mr. Fuller, of this furniture and all these fixtures, and these specifications for the building, did he retain those or did he at any time send them back to you?

[fol. 164] Mr. Lee: Objected to as incompetent, irrelevant and immaterial.

By the Court: Overruled.

Mr. Lee: Exception.

A. I never received the specifications back.

By Mr. Anderson:

Q. You never did?

A. No, sir.

Q. You say at this meeting of the board about February 27th that Mr. Fuller said that the building was over insured?

A. He made a remark something of that nature.

Q. Did they offer to return any part of the premium that had been paid?

Mr. Lee: Object to that as incompetent, irrelevant and immaterial.

By the Court: Overruled.

Mr. Lee: Exception.

A. He did not.
Q. Have they ever offered to?
A. No, sir.

Mr. Lee: Same objection, incompetent, irrelevant and immaterial.
By the Court: Overruled.
Mr. Lee: Exception.

Q. At the time Mr. Fuller and Mr. Kline came to see you about the 10th or 12th of January, after that fire, I will ask you whether you then informed Mr. Fuller and Mr. Kline that your records had been destroyed in the fire or not.
A. Yes, sir, I advised them my records including the policies had burned.
Q. At the time of this meeting about February 27 when you say Mr. Cableman [Kebelman] was present and said he would rebuild it for about $55,000, did he submit any plans and specifications in connection with that statement or offer?
A. No, sir, he only said he would put it back like it was.

Recross-examination.

By Mr. Lee:

Q. As a matter of fact, he hd with him and had exhibited to Mr. Kline and Mr. Fuller and the others there present quite a considerable amount of figures, hadn't he?
[fol. 165] A. He had quite a few figures there. I suppose he did, the only figures that was mentioned; was the amounts he would rebuild the buildings for.
Q. And he had been up there before you said?
A. Yes, sir.
Q. And looked the situation over?
A. Yes, sir.
Q. And asked you some questions about it?
A. Yes, sir.
Q. And you told him what you knew about it?
A. Yes, sir.
Q. Mr. Cableman [Kebelman]?
A. Yes, sir.
Q. How did you happen to have the Royal Insurance policy by itself?

A. I can't tell you just how it happened to be down at the house. It might be I secured it from the agent and taken it to the house and never taken it to the school house.

Q. You say there figures, these specifications on the new part of the building were never returned to you. Did you ever ask for them back?

A. No, sir.

Q. Now, at that big meeting you had there the latter part of February, 1926, when you say this offer was made by Mr. Fuller, I want to ask you this, didn't you or some other member of the school board there in your presence say in answer to the offer made or in answer to the offer Mr. Fuller said, that you had a lawyer or a firm of lawyers who had agreed for a fee of $2500 to collect the full amount of these policies?

A. Absolutely not.

Q. There wasn't anything like that said?

A. No, sir.

Mr. Flynn: I object to that. That is improper cross examination.

By the Court: Yes, I think so. It will be stricken and the jury instructed not to consider it. It might be true but it is not material.

Mr. Lee: Exception.

By Mr. Lee:

Q. I will ask you if the school board had not at that time already consulted attorneys with the idea of bringing a suit upon these policies?

[fol. 166] Mr. Anderson: Object to that as incompetent, irrelevant and immaterial.

By the Court: Sustained: They had a right to consult an attorney if they wanted to.

Mr. Lee: I think so. I am not asking it for that purpose, not at all.

By the Court: It is improper.

Mr. Lee: Very well. Allow us an exception.

(Witness excused.)

LEE HALL was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. State your name.
A. Lee Hall.
Q. Where do you live?
A. I live at Yale.
Q. What is your business?
A. I am in the bank.
Q. Did you live there in October, 1925?
A. I did.
Q. Did you have anything to do with the writing of the insurance on the school building for school district 98 in October, 1925?
A. Yes, sir.
Q. What did you have to do with it?

Mr. Thurman: The defendants object for the reason it is incompetent, irrelevant and immaterial and does not tend to prove any issue in this case, for the reason the execution of all the policies sued on has been admitted.

Mr. Anderson: It is not offered for that purpose.

By the Court: Overruled.

Mr. Thurman: Exception.

By Mr. Anderson:

Q. What did you have to do with it?
A. Mr. Sloan and I wrote part of the insurance.
Q. You and Mr. Earl Sloan?
A. Yes, sir.
[fol. 167] Q. Was the agency carried in the name of both of you or just Mr. Sloan?
A. No, sir, just Mr. Sloan's name.
Q. What particular one of these companies did he represent?

Mr. Thurman: Objected to as incompetent, irrelevant and immaterial and does not tend to prove any issue in this case.

By the Court: Overruled.
Mr. Thurman: Exception.

A. He represented the National Fire Association, and he represented some other companies, but they were not insured except these two.

Q. The National and also the Fire Association?

A. Yes, sir.

Q. Did you go out to see this property before this insurance was written or not?

Mr. Thurman: Objected to as incompetent, irrelvant and immaterial and does not end to prove any issue in this law suit.

By the Court: Overruled.
Mr. Thurman: Exception.

A. Yes, sir.

Q. Did you write the policies yourself, or did Mr. Sloan write them?

Mr. Thurman: The defendants object as incompetent, irrelevant and immaterial.

By the Court: Overruled.
Mr. Thurman: Exception.

A. Mr. Sloan wrote them.

Q. And you went out, you say, and saw the property?

A. Yes, sir.

Q. Did anybody go you there with you to look at that property before you insured it?

A. Yes, sir.

Mr. Thurman: The defendants object as incompetent, irrelevant and immaterial and does not tend to prove any issue in this case.

By the Court: Overruled.
[fol. 168] Mr. Thurman: Exception.

Q. Who?

A. Well, I was out there twice.

Q. Well, the first time.

A. Mr. Wilkinson was with me the first time.

Q. What Mr. Wilkinson?

A. I think his initials are J. E.

Q. Where did he live?

A. Oklahoma City.
Q. Whom did he represent, if anybody?

Mr. Thurman: We object to this——
By the Court: Overruled. He has a right to show the value of this property.
Mr. Thurman: He is asking him now who he represented.
By the Court: That is preliminary. This is a general agent up there or inspector or something. He would have a right to prove it, wouldn't he?
Mr. Thurman: Not by this witness without some indication that this witness was connected with the company in some way or was in a position to know.
By the Court: This is preliminary. Overruled.
Mr. Thurman: Exception.

Q. Who did he represent, if anybody?
A. I believe it was the fire association.

Mr. Thurman: I move to strike out the answer because it is the witness' belief.
By the Court: Sustained.

By Mr. Anderson:

Q. Do you know whether or not he did?
A. Yes, sir.
Q. The Fire Association was one of which you and Mr. Sloan wrote, wasn't it?
A. Yes, sir.
Q. In what capacity did Mr. Wilkinson represent the Fire Association? Was he the general agent or what was he?
A. He was general agent or special agent.
Q. Now, he went out with you, you say, on the first trip?
A. Yes, sir.
[fol. 169] Q. About when was that with reference to the time the policies were written?
A. It was probably forty or sixty days.
Q. Before they were written?
A. Yes, sir.
Q. You say he went out and looked at the property?
A. Yes, sir.
Q. Did he after that time authorize you to write these policies so far as his company was concerned?

Mr. Thurman: Object to that as calling for a conclusion of the witness, leading and incompetent, irrelevant and immaterial.

By the Court: Overruled.

Mr. Thurman: Exception.

A. Well, we wrote $25,000 in the Fire Association.

Q. That was his company?

A. Yes, sir.

Q. Was that with his approval or not?

Mr. Thurman: Object to that as calling for a conclusion.

Mr. Anderson: If he knows.

By the Court: If he knows whether he approved it or did not approve it he can answer. Overruled.

Mr. Thurman: Exception.

A. Well, we wrote the policy and they accepted it.

By Mr. Anderson:

Q. Did he understand at that time that there was a total of $75,000 insurance being written on all that property out there?

Mr. Thurman: We object to that as incompetent, irrelevant and immaterial and this witness is not competent to testify what somebody else did or understands.

By the Court: Objection sustained.

By Mr. Anderson:

Q. Was there anything said to Wilkinson about $75,000 being the total insurance written on that property and his company taking part of it?

A. I don't remember whether there was or not.

Q. Let me ask you this. If Mr. Wilkinson was not told that it was $75,000 that the board wanted, and that it was to be divided up between the four companies and then he [fol. 170] approved the policy for his company for the $25,000. Isn't that a fact?

Mr. Thurman: Object to that as leading and suggestive.

By the Court: Yes, that is leading and suggestive. You can ask him what was said about these matters.

By Mr. Anderson:

Q. What was said to Mr. Wilkinson about how this insurance was to be handled and how much there was to be of it?

A. I don't know as there was anything said about how much insurance there was to be. He understood there was to be $25,000 in his company.

Q. Did he know anything about what was to be in these others, if you know?

A. I couldn't say.

Q. Did you go out there any other time to look at this property before these policies were written?

A. Yes, sir.

Q. When was that with reference to the time that they were written?

A. That was prior to the time the policies were issued. It was only just a few days before the policies were issued.

Q. Referring back to the policy you issued, to the one now in the Fire Association, that you say Mr. Wilkinson represented, not having that form of policy before me, can you tell me wether or not that policy showed the total amount of insurance being written at that time on that building? In other words, whatever indebtedness there was carried by the other companies, did that policy show it?

A. I am not sure whether it does or not.

Q. I show you Plaintiff's Exhibit 2, being a copy of the statement that was attached to the Concordia Fire Insurance policy, which they have admitted was written at the same time, and ask you if you can tell me whether or not the policy by the Fire Association showed that same information as to the total amount of insurance.

Mr. Thurman: We object to that. The witness has already stated that he could not state anything about what was on the policy written. This exhibit has no relationship to that in the sense that this witness had anything to do with this exhibit, and therefore it could not be used to refresh his memory.

By the Court: Overruled.

[fol. 171] Mr. Thurman: Exception.

A. Well, I believe it did.

Q. You believe it did?

Mr. Thurman: I move to strike the answer of the witness.

By the Court: Do you know?

A. I don't know.

By the Court:

Q. Did you say anything to Mr. Wilkinson about how much insurance was to be carried on the building?

A. I don't recall that I did.

By Mr. Anderson:

Q. I will ask you if it isn't a fact that when policies are written concurrently on a piece of property by different insurance companies, and one knows of the other's insurance, in other words, when it is divided up among them like this was, if each policy doesn't show the amount of insurance by the other, the whole amount of insurance? Is not that the universal practice?

Mr. Lee: Object to that as incompetent, irrelevant and immaterial, and for the further reason that it assumes a state of facts not proven and which do not exist in this case. These policies are not concurrent policies, and they do not all cover the same property.

By the Court: Sustained. The question is leading also.

Mr. Lee: Yes.

Mr. Anderson: I want your Honor to decide it on the objection ond not his testimony.

Mr. Lee: What I stated is in the record.

By Mr. Anderson:

Q. When was the second trip you made out there?

A. Just a few days before the policy was issued.

Q. Who went with you at that time?

A. Mr. Charlie Morris.

Q. Who was he?

A. He was representing one of the other companies.

Q. Do you know which one?

A. I believe he said the Braniff. I think it was the Concordia.

Q. Who else?

A. Mr. O. H. Frank.

[fol. 172] Q. You went out there for the purpose of looking at this property, didn't you, before you wrote these policies?

A. Yes, to get one of the old policies, to follow the form.

Q. Who was Mr. O. H. Frank?

A. He is a merchant in Yale.

Q. After you went out and looked at it on that trip then shortly after that this insurance was written, was it?

A. Yes, sir.

Q. Whenever one of these policies is written by a local agent is it to be approved by anyone else or not, taking your own company now?

A. Well, Mr. Sloan writes the policy, and if they have any objection to it they will come back and tell us about it.

Q. Who is it decides it shall be or shall not be?

A. Well, the state agent.

Q. The state agent?

A. Yes, sir.

Q. Then in the case of the fire in this case that would have been Mr. Wilkinson, you say?

A. I am not sure that Mr. Wilkinson was the state agent.

Q. That is your best knowledge, isn't it, now?

A. Yes, that is right.

Q. If they object to it who do they notify?

A. Notify the agent.

Q. The local agent?

A. Yes, sir.

Q. Did anyone connected with either of the companies you represented object to either of those policies you issued?

A. Not within my knowledge, no, sir.

Q. Or the amount of the insurance?

A. No, sir.

By the Court: I can't hear you, Mr. Witness.

A. I said they didn't object as far as I know.

By Mr. Anderson:

Q. Did you know there was $75,000 worth of insurance being written on that property out there at the time the policies were issued?

A. Yes, sir.

Cross-examination.

By Mr. Thurman:

Q. You said you went out there with Mr. Wilkinson?

A. Yes, sir.

[fol. 173] Q. When was that?

A. It was forty or sixty days, something like that, prior to the time the policies were issued.

Q. Did you go in the building?

A. No, sir.

Q. Did you go in the addition to the building?

A. No, sir.

Q. Why didn't you?

A. There wasn't anyone there.

Q. You couldn't get in?

A. No, sir.

Q. You saw the building from the outside?

A. Yes, sir.

Q. You didn't know what was in it?

A. No, sir.

Q. You say you are not sure that Mr. Wilkinson was the state agent for either of the companies in this state at that time?

A. State agent or special representative, I don't know which he was.

Q. When you said that Mr. Wilkinson approved writing one of these policies, you meant that so far as you know he never objected to the amount of the insurance?

A. Yes, sir.

Q. He didn't sign it as approved by him?

A. No, sir, he doesn't do that.

Q. He, so far as you know, never saw the policy until after it was written?

A. Not that I know of, no.

Q. As a matter of fact you understand that he went out there to see whether or not this property was in the locality where they wanted to carry insurance?

A. So far as I know he went out there to approve the risk.

Q. Well, that is what you meant by approving the risk, whether or not it is in a locality where they want to carry it?

A. Yes, sir, I wanted him to carry it.

(Witness excused.)

A. E. Sloan was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

[fol. 174] Direct examination.

By Mr. Anderson:

Q. State your name.
A. A. E. Sloan.
Q. You live at Yale?
A. I do.
Q. What business are you in?
A. Banking business.
Q. Did you represent as local agent some fire insurance company?
A. I do.
Q. And you did in October, 1925?
A. I did.
Q. Did you represent any of the companies that wrote the insurance on the school property for School District 98 in Payne County in October, 1925?
A. I did.
Q. What ones?
A. The Fire Insurance Association of Philadelphia and the National Fire Insurance Company of Hartford, Connecticut [Connecticut].
Q. Did you look after the writing of those policies, or did Mr. Hall?
A. I wrote the policies.
Q. You wrote the policies?
A. Yes.
Q. And who furnished you the information?
A. Mr. Hall.
Q. He is connected with you in the bank?
A. Yes, sir.
Q. Do you recall the fire they had out there?
A. I do.
Q. Did the members of the school board or any of them, advise you of that fire after the fire?
A. They did.
Q. About how long after?

A. The next morning after—the same morning that the fire happened.

Q. Do you recall who advised you?

A. I do.

Q. Who?

A. Mr. Langston.

[fol. 175] Q. That is the Mr. Langston who has been on the witness stand?

A. Yes, sir.

Q. What, if anything did you do with reference to notifying the two companies you represented?

A. I filed out the usual notice of loss.

Q. Was that on a form furnished you for that purpose?

A. On a form furnished by the companies.

Q. To whom did you send those in behalf of your companies, if you recall?

A. To the best of my recollection I sent one to the State Agent of the Fire Association at Oklahoma City.

Q. Who was that?

A. No, I beg your pardon, I did not. I sent one to Trevant & Cochrane at Dalla- [Dallas], Texas.

Q. Who are they?

A. They are general agents.

Q. For whom?

A. Well, they are general agents for the Fire Association.

Q. Did you send one to anybody else in behalf of the company?

A. I sent one to the Home Office.

Q. Where is that?

A. At Philadelphia.

Q. Now then, as to the National, I believe you represented it?

A. I did.

Q. To whom did you send notice of the loss?

A. I sent one to Mr. Charles H. Conway, State Agent of the National at Oklahoma City, and one to the Home Office at Hartford, Connecticut/ [Connecticut].

Q. When did you send those notices to those parties with reference to the time the fire occurred?

A. Well, I am under the impression they were mailed the same day.

Q. You say you wrote the policies for the National and for the fire Association. Can you tell me whether or not those policies show the total amount of indebtedness on the property?

Mr. Lee: Objected to as incompetent, irrelevant and immaterial.

[fol. 176] By the Court Overruled.

Mr. Lee: Exception.

A. I am quite sure that they did.

By the Court:

Q. When you wrote this insurance did you fill out a daily report?

A. Yes, I made a daily report.

By the Court:

Q. In your daily report did you show the total amount of insurance written on this risk?

A. I am quite sure I did. There was a place for it on the daily report, and if it wasn't filled out it was an oversight.

Q. Well, you made it in the report?

A. I did.

Cross-examination.

By Mr. Lee:

Q. I hand you a paper and ask you to state if you know what that is.

A. That is a standard form that is attached to the policy, one to the daily report. That is mailed to the Rating Bureau and one of them is attached to the copy of the daily report that is pasted in the registry.

Q. Now, I will ask you if that isn't a copy of this yellow slip attached, if that doesn't constitute a copy of your daily report to the National Fire Insurance Company?

A. No. There is more than this. This isn't a daily report in itself.

Q. Where on that daily report then, was it that the total amount of insurance was shown?

A. There is a place on the back of the daily reports to show the amount of the insurance in the other companies.

Q. You can't be positive whether or not that was filled out, can you?

—. ——.

Q. Mr. Sloan, you stated immediately after you were notified of this loss by the school board, by Mr. Langston, that you sent in notices to the two companies concerned or to the representatives of the two companies. Those notices are just simply notices advising them that a loss has occurred, isn't it?

A. That was all.

Q. And the date of it, and whether it is a total loss or partial loss. Isn't that about it?

A. That is right.

Q. That has no connection, has it, with what we call a proof of loss?

[fol. 177] A. None whatever.

Q. Or sworn statement of the assured?

A. No.

Q. It is just a notice by you to the company that the loss has happened without attempting to give the details, is that right?

A. That is right.

(Witness excused.)

W. A. Northgate was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name?

A. W. A. Northgate.

Q. Where do you live?

A. Yale, Oklahoma.

Q. What business are you in?

A. Banking.

Q. Did you represent either of the insurance companies that wrote the insurance on this school building involved in this action?

A. Yes, represented the Royal.

Q. Did the members of the school board advise you of this fire soon after it occurred, or not?

A. Yes, sir.

Q. About how long afterwards?

A. I think it was the same day Mr. Langston advised me in person.

Q. Did you notify anybody connected with your company then?

A. The state agent and the head office.

Q. Who was the state agent?

A. I am not sure whether it was Young or George W. Price, not Price, but George W. Kline. I think Mr. Kline succeeded Mr. Young, but I am not sure which one was state agent at the time the loss occurred.

Q. Had Mr. Mandy Young been the state agent for them shortly before that or not?

A. Yes, sir.

Q. How long before the fire?

[fol. 178] A. He was state agent in June, I think about the middle of June when he called at our office.

Q. When did you notify them with reference to the time the fire occurred?

A. Immediately that day or the day following. I think the same day.

Q. Did you write the policy for your company on this property?

A. I did.

Q. And you represented you say the Royal?

A. Yes, sir.

Q. In the handling of the business there for the company locally, did you make a daily report to your company?

A. Yes, sir.

Q. When you issued policies?

A. For every policy written.

Q. In your daily report would you show the total amount of insurance on the property your policy covered?

A. Yes, sir.

Q. Did you do that in this instance?
A. Yes, sir.

Cross-examination.

By Mr. Lee:

Q. You stated you sent in a notice of loss right after you found out about the loss. That is just simply a little short written notice to your company telling them the loss has occurred?
A. Yes, a stock form.
Q. A regularly printed form of notice of loss?
A. Yes, sir.
Q. That has nothing to do with the proof of loss or sworn statement of the insured?
A. No, sir.
Q. Required by the policy, was it?
A. No, sir.
Q. Now, is there anything on this policy that you issued showing the total amount of insurance on the property?
A. No, sir, nothing on the policy.
Q. Have you one of the daily report forms here?
A. I don't know. I don't have it with me.
Q. You keep a record of those things, don't you?
[fol. 179] A. Yes, sir.
Q. Where is that record?
A. At Yale.
Q. Why didn't you bring it with you?
A. Well, I had the information that it contained relative to that item.
Q. You had been asked to look for that particular item, had you?
A. No, sir.
Q. You had not?
A. No, sir.
Q. How did you know then?
A. I didn't know.
Q. How did you know that it contained the information they wanted from you?
A. I didn't know.
Q. You didn't know it?
A. No, sir.

Q. You were just subpoenaed as a witness and they never talked to you, did they?

A. Nothing except they said they would want me as a witness, but the nature of the testimony was not disclosed.

Q. Nothing was asked you about what your record showed?

A. No, sir.

(Witness excused.)

G. E. Autry was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name?

A. G. E. Autry.

Q. Where do you live?

A. Enid.

Q. Did you used to live at Yale or near Yale?

A. I did at North Fork or near North Fork, yes, sir.

Q. That is where this school property is located, is it?

A. Yes, sir.

[fol. 180] Q. Were you ever a member of the school board of that district?

A. I was a clerk.

Q. Were you there when the original part of the building was constructed that is under consideration in this case?

A. I was.

Q. Were you there when the addition was constructed to that building in 1923?

A. I was not.

Q. When was the original part of that building constructed?

A. In the year 1917 and 1918.

Q. Do you recall the size of it?

A. No, I do not, exactly.

Q. What, if anything, did you have to do with the building of that original building?

A. I superintended the construction of the original building.

Q. Are you a contractor?

A. Yes, sir.

Q. What experience had you had in contract work prior to the time that building was constructed?

A. Well, about nine or ten years.

Q. Do you know what character of material was used in the construction of that building?

A. I do.

Q. What kind was it?

A. It was first class material throughout.

Q. How was that building constructed, was it constructed by letting the contract or by hiring labor, or by buying the material?

A. It was constructed by hiring and purchasing the material and employing laborers on the job to do the work.

Q. Who employed the labor, did you do that or was the labor contracted?

A. The labor was employed there by the architect and the members of the board.

Q. You say you supervised the entire construction of that building?

A. Yes, sir.

Q. Were you there all the time during its construction?

A. Yes, sir.

[fol. 181] Q. What kind of brick was used in constructing it?

A. Well, there was a good grade of common brick and the outside walls were built of oxblood pavers, assorted to color.

Q. Are those brick that endure for a long time or a short time?

A. A long time. No better brick could be purchased at that time.

Q. Tell this jury about how that building was constructed.

A. Well, the foundation was put in by placing large stones bedded in sand and brought up with stone and concrete, up to the grade line, and there we started with a twenty-one inch wall, brick wall.

Q. That is twenty-one inches thick?

A. Twenty one inches thick. That is five brick and up to the floor line, and there we dropped back to seventeen inch wall, which is four brick, and continued the seventeen inch wall up to the second floor, and from the second floor we built a thirteen inch wall up to the plate for the roof, and this was laid in lime mortar, measured and tempered with cement. It would probably run something near to two sacks of cement to a barrel of lime putty so it would withstand the weather.

Q. Did the board have any estimate made for the construction of that building?

A. The estimate was made by the architect at the time he drew the plans and specifications for the building.

Q. Do you know what that estimate was?

A. $56,000.

Mr. Thurman: We object to that because the construction of the original building could not possibly be admissible for any purpose in this case.

By the Court: Overruled. That is the basis. That is a circumstance. The jury is entitled to have that information. That would not be conclusive, however, as to its value at the time of the fire but that is a circumstance.

Mr. Thurman: It would not be conclusive of its value at any time because it cost that to build it.

By the Court: It is a circumstance.

Mr. Thurman: The defendants except.

By Mr. Anderson:

Q. Do you know about what the depreciation would have been on that building from the time it was constructed in [fol. 182] 1917 and 1918 up to the time it burned on January 2, 1926?

A. Only as to the depreciation to buildings of that character for I never seen the building after that time.

Q. Well, basing it on your knowledge of the building, having supervised its construction and taking into consideration whatever it would have depreciated under ordinary conditions, can you tell me about what that original building was worth on January 2, 1926, at the time it burned?

Mr. Lee: We object to that as incompetent, irrelevant and immaterial as to what the building was worth. He

says he never saw the building after the time it was built and he certainly would not be in a position to give an estimate of the value of it.

By the Court: No, he can testify in answer to that question what the given depreciation would be for that period of time.

Mr. Anderson: Yes. Now, I am going at it this way. Taking it based on his own experience as a contractor and his experience in having constructed that building, and then taking into consideration what the depreciation would have been under ordinary conditions.

By the Court: Yes, but you haven't laid the foundation yet as to the value of the building at the time he laid it.

By Mr. Anderson:

Q. What was the value of that building in your estimation at the time it was constructed?

Mr. Lee: We object to that because the witness hasn't shown himself qualified to answer.

By the Court: Well, if he knows.

Mr. Anderson: I will get down to that.

By Mr. Anderson:

Q. Can you tell me what the value was? Do you know, at the time it was constructed?

A. Well, by figuring the building at that time, my estimate of the building under a contract would have been just about what the architects estimate was on it.

Q. You haven't yet quite answered my question. Having supervised the construction of that building and based upon your knowledge and experience as a contractor, can you tell me what the building was worth when it was completed?

By the Court: Answer that yes or no.

A. Yes.

[fol. 183] By Mr. Anderson:

Q. Tell me in your judgment what that building was worth when it was completed?

A. About fifty or fifty-five thousand dollars.

Q. Now, taking that as the value of the building when it was completed, and taking into consideration what it would have been depreciated under ordinary conditions down to January 2, 1926, can you then tell me about what that building was worth on January 2, 1926?

Mr. Lee: We object to that for the reason it is incompetent, irrelevant and immaterial, and the witness is not qualified to answer. He might possibly testify as to what the ordinary depreciation would be——

By the Court: Yes, I think so.

Mr. Anderson: I will withdraw it.

By the Court: Part of it might have blown away. He hasn't seen it since it was built.

Mr. Anderson: Of course, if that was true they would show it.

By Mr. Anderson:

Q. Do you know about how much that building would have depreciated from the time it was completed until January 2, 1926?

A. Well——

Q. Tell me first whether or not you know.

A. Yes, sir.

Q. I will have to qualify you. If I didn't you would not be competent to answer. You do know?

A. I know what the general depreciation is of buildings of that character but not of this particular building. I am not clear as to what you want me to answer.

Q. What I want you to tell me is whether or not you know what a building of that character would have depreciated during that time under ordinary circumstances.

A. Yes, sir.

Q. How much would it have depreciated in your judgment from the time you completed it until January 2, 1926?

A. Well, buildings of that character and used for that purpose, in that lapse of time, the floors would probably have depreciated in the neighborhood of 15 per cent. The other, wood frames and material probably 8 or 9 per cent. The general building, the other structure would not have exceeded 2 per cent, probably 1½.

Q. Now can you tell me about what proportion of the [fol. 184] worth of that building when it was completed constituted the floor? Tell me yes or no, first, if you can.

A. Well, I couldn't off hand.

Q. Well, can you tell me approximately how much?

A. Well, the woodwork would run about 50 per cent, I mean about 10 per cent of the cost of the building.

Q. You mean by woodwork the floors and wood trimming both?

A. Yes, sir.

Q. Can you give me any expression as between the floors and the other woodwork?

A. Well, it would probably run about 50 per cent; the floors would probably run about 40 per cent.

Q. Of the woodwork?

A. Yes.

Q. You were not there when the addition was constructed?

A. No, sir.

Q. You don't know anything about it, I take it. Was that building constructed according to plans and specifications?

A. *Yes, sir.*

Q. Do you know whether or not it was constructed according to these plans and specifications?

A. Yes, sir, I do. You are speaking of the original building?

Q. Yes, sir, as I understand your testimony, it is not related to the addition and you don't know anything about it?

A. Nothing whatever.

Q. And it was constructed according to these plans and specifications?

A. Yes, sir.

Q. When you speak of the depreciation as to the floors, does that mean the entire floor or the surface floor or does it apply to the sub-floor?

A. It is not applied to the sub-floor.

Q. Why not?

A. Because the sub-floor is not affected only in a very small degree. In fact, if water scrubbing is done care-

fully or not done at all, the floor would not be affected in any way.

By the Court: The witness didn't complete an answer a moment ago. The jury are not all experts along this line and the Court is just a partial expert.

By the Court:

Q. From you- [your] knowledge of that building your [fol. 185] general knowledge of construction work in general, basing your first estimate that that building cost and was worth at the time it was built from $50,000 to $55,000, and taking into consideration now the natural depreciation, assuming that there is no other depreciation to the building except the natural depreciation which would occur in any building of that character over a period of the same time, what is your judgment as to its value on January 2, 1926, at the time it was burned?

A. Well, I would have to do some figuring on that.

By the Court: Well, you can answer that question later if you prefer.

A. I really would prefer to do that.

(Hereupon the witness makes some computations.)

A. I would say about $1200 to $1400.

Q. You mean depreciation?

A. Yes.

By the Court:

Q. Would be $1200 to $1400?

A. One and one-half per cent of $5000 would be $750, and ten per cent on the other would be $500.

By Mr. Anderson:

Q. You haven't yet answered the Court's attention as to what that left the value on January 2, 1926.

Mr. Lee: Object to that as incompetent, irrelevant and immaterial. This witness has not shown himself competent to testify to any of these things, only to the ordinary rate of depreciation on this kind of a building, and is not quali-

fied to testify as to the value of this building at the time of the loss.

By the Court: Overruled.

Mr. Lee: Exception.

A. About $53,000 or $54,000.

Q. Now that is the original building, only?

A. The original building.

Q. And does not include the addition?

A. I know nothing of the addition.

Cross-examination.

By Mr. Lee:

Q. What depreciation did you figure for the roof of that building?

A. None.

Q. What kind of a roof did it have?

[fol. 186] A. A tile roof.

Q. Do you know whether ordinarily in hail storms or anything of that kind in this country that it damages roofs of that kind?

A. It would be an extraordinary hail if it ever occurred on a roof of that *time* [kind].

Q. Did you allow any depreciation for the weathering of the mortar?

A. Yes, sir.

Q. How much?

A. One and one-half per cent on the building. That would be the total on the building outside of the woodwork.

Q. And you say the woodwork on that building amounted to only about ten per cent of it?

A. I was speaking of the trim and the floors.

Q. Well, is there any other woodwork?

A. Oh, yes, there is the trusses and roof and lath and joists for the floors and ceilings above.

Q. And you allowed no depreciation whatever on the roof?

A. Well, not necessarily the roof, but that one and one half per cent would cover the entire building on the depreciation outside of the floor and trim, as I figure it.

Q. How much depreciation did you allow on sub-floors and floor joists, how much did you allow on those?

A. One and one-half per cent.

Q. How long do you consider that a sub-floor in a building of that kind taken care of as they ordinarily are, would last?

A. Well, it ought to be good for sixty or seventy-five years.

Q. And you mean that is true of the ground floor as well as the second floor, do you?

A. There is no difference between the floors because this building was elevated up off of the ground with a basement under a portion of it.

Q. How much of it was there a basement under?

A. I don't remember the dimensions exactly. I know the basement was dug.

Q. The part there wasn't a basement under, what about that floor and sub-floor then?

A. It would not be affected by it.

Q. How high was it off the ground?

A. It was about two feet or two feet and a half.

Q. How was it ventilated?

[fol. 187] A. Well, it was ventilated by the boards and openings into the basement.

Q. That is the only way?

A. Yes, sir.

Q. Yet you say there would only be one and a half per cent depreciation on that floor?

A. That is what I intended to say.

Q. Let me ask you this: Do you know what the comparative difference between the material prices and labor prices were in 1927 and 1918 at the time this one part of the building was built and the same prices, that is, the prices for the same material and labor in January, 1926?

A. Well, the prices of material would probably run something near the same. The prices of labor would probably be a little more.

Q. A little more what?

A. More than it cost there on this building.

Q. You mean to tell the jury, do you, that the price of labor was higher in 1926, in January, 1926, than it was in the latter part of 1917 and the fore part of 1918?

A. Yes, sir, I do. I bought materials then and have bought material right along ever since and paying more for material today than I was then. Material is worth more today than it was in 1926, brick.

Q. That is, worth more in January, 1926, than it was in the latter part of 1927 [1917] and the fore part of 1918?

A. No, I didn't make that statement. I said they were practically the same.

Q. There wasn't any appreciable depreciation between 1917 and 1918 and January 1926. Is that what you mean to say?

A. The values of material?

Q. Yes, sir, the cost of material.

A. The cost of material. The hardware that is used, there has practically never been a change in the price of hardware, builders' material that I have been able to notice since the war. Brick were higher; possibly lumber might have been a little cheaper at that time, and lumber was possibly a little higher.

Q. How about labor?

A. Labor was higher. My labor on that building cost me 75 cents. In 1926 I was paying that.

Q. For the same kind of labor?

A. Yes, sir.

Q. What did you pay on this building for common labor? [fol. 188] A. I think it was $3.25 or $3.50.

Q. For an eight hour day?

A. Yes, sir.

Q. What did you pay for carpenters?

A. Seventy-five cents; $6.00 a day.

Q. What did you pay for brick layers?

A. Paid the brick layers a dollar an hour.

Q. What did you pay for these brick?

A. It was $23 or $24 for the pavers, and I don't remember what it was for the common brick.

Q. Well, you don't have any idea?

A. Well, it would probably run around $12 or $14.

Q. Where did you buy those brick?

A. From the Coffeyville Vitrified Brick Company of Coffeyville, Kansas.

Q. Do you remember how many thousands of brick of each kind were used?

A. No, I don't.

Q. Now, you say this old building was constructed according to the plans and specifications. Whose plans and specifications?

A. W. H. Haviland, an architect.

Q. Where does he live?

A. At Alva.

Q. Do you know whether he is still living there?

A. He is not living. He is dead.

Q. Do you know whether he was living there in 1926?

A. No, I don't.

Q. Do you remember what this building actually cost this School District?

A. I do not.

Q. You were clerk there at the time?

A. Yes, sir.

Q. And you superintended the job?

A. Yes, sir.

Q. And you don't remember the cost?

A. No, I don't, approximately.

By the Court:

Q. You made a statement awhile ago that the actual cost of the building was pretty close to the architects [architect's] estimate. Was that correct?

A. I figured the building, figured on letting a contract [fol. 189] for it before they voted for the board to build this building, and my estimate of the cost of the building, figuring from the contractor's standpoint was about what the architect had figured.

By the Court:

Q. You mean your estimate was about the same as the architects [architect's] estimate?

A. Yes, sir, but I figured from the material standpoint and compared notes with him.

By the Court:

Q. Now, do you have any recollection as to how much the building cost——

A. It cost less than that.

By the Court:

Q. Cost less than that?

A. Yes, sir.

By the Court:

Q. Do you know how much less?

A. No, I don't. That can be ascertained from the warrants.

By the Court:

Q. You don't know how much less?

A. No.

By Mr. Lee:

Q. I believe you said the life of this floor would be 60 to 75 years, in your judgment.

A. Which floor are you speaking of?

Q. Both floors.

A. No, not at all.

Q. Well, what would be the life of the first floor?

A. The life of the first floor would probably be ten or twelve years.

Q. I beg your pardon. I mean the whole floor, say the sub-floor first, then if you want to, the sub-floor and the floor joists, or both the first and second stories, what would be the life of that part of the floor?

A. The life of that floor under ordinary care from the buildings that we have wrecked and then torn down, erected and re-erected, my estimate would not be less than 50 or 60 and possibly 70 to 75 years.

Q. What about the rest of the woodwork?

A. The rest of the woodwork in the building that is used as a school building, it depreciates in value very rapidly, especially the floor and the trim.

Q. The window casings and door casings and those things depreciate rapidly up there, don't they, anything exposed to the weather?

A. Certainly.

[fol. 190] Q. The paint. Did you figure any depreciation on repainting?

A. Yes, sir.

Q. If the sub floors and the rest of that building would last 50 to 75 years, how do you arrive at the conclusion that in nine years they would only depreciate to the value of 2 per cent?

A. The sub floors and the balance of the wood outside of the trim I mean of the floor and the trim, I think maybe an estimate of 1 and one-half per cent of that, that is the estimate of the depreciation as to the value of that, would be the same as the building outside, the walls and foundation.

Q. But you stated, didn't you, that you estimated that this woodwork outside of the top floor, that is the main floor, and the trim, would last from 50 to 75 years. Is that right?

A. That is right.

Q. Then your depreciation on that would be from one and one-third to one and a half or two per cent per year, wouldn't it?

A. You are talking about the sub floor and joists. The estimate I made was on the brick, or stone and the balance of the woodwork combined. I made no distinction between the two.

Q. All right, now, what do you now say would be the depreciation on the woodwork in that building for nine years?

A. What wood work are you talking about?

Q. All of it; what would be the depreciation on the woodwork?

A. Well, I haven't changed my answer on that yet.

Q. How much is it?

A. About one and a half or two per cent.

Q. You testified, did you not, that the floor proper would depreciate fifteen per cent?

A. The floor and the trim, yes.

Q. How long did you say they would last, the floors proper and the trim in this building, how many years?

A. Well, about nine or ten years; somewhere along there.

Q. Then they would depreciate 10 per cent per year, wouldn't they?

A. Yes, about that.

Q. And what would those floors cost new? What did they cost?

A. I don't remember what that item was.

Q. And now your sub-floors, your joists and the wood [fol. 191] material used in supporting the roof, you say they would depreciate about one and a half per cent per year?

A. Or two, two and a half, one and a half, somewhere along there.

Q. Per year?

A. Yes.

Q. And in nine years then the depreciation would be from 13 to 22 or 23 per cent, wouldn't it? Isn't that right?

A. No, not per year.

Q. Well, I want to understand you.

A. All right, sir. If I can possibly tell you, you shall. I said the balance on the building depreciated, the depreciation from 1917 to 1926 would not exceed one and a half or two per cent on the building outside of the floors, the finished floors and the trim.

Q. In other words, it is your opinion that those portions of the building outside of the floors and the trim were good for at least 400 years?

A. Good for 400 years?

Q. Yes, sir, is that right?

A. No, sir, it isn't right.

Q. Well, then I want to get at how you figure there would only be one and a half per cent depreciation in this building in nine years. That is what I want to know.

A. Those brick walls, the foundation and the marble or the carthage stone or material that was used in there.

Q. Let's get at it in another way. How long do you say the balance of that woodwork, outside of the floors and trim and brick and stone part of the building would last?

A. Well, the stone and the brick would last—it would be hard to estimate what that was, of course the woodwork would naturally depreciate and go first.

Q. Well, let's take them separately, then. How long would you say the stone and brick work would last?

A. Well, that would be *yard* [hard] to estimate that class of stone work.

Q. You have made an estimate on what the depreciation would be; what would you say would be the life of that building without repair? That stone and brick work and your tile roof?

A. Well, there is my estimate.

Q. How many years do you say it would stand?

[fol. 192] By the Court: Just answer in your best judgment.

A. Well, under those constructions I don't think it would be over one and one-half per cent during that time.

Q. It is your estimate then that the brick and stone work and roof on that building would last for more than 600 years. Is that right?

(No answer.)

Q. That is all.

By the Court:

Q. What do you think the life of that building would be?

A. Well, that building ought to be constructed as the best or as it was, time, for many years would not have but very little effect on it. Now, I am speaking, I base the one and a half per cent on that building, on the price the buildings will sell for. A building constructed as that building and sold within the time this building was built, there would not be a depreciation in the sale of the building constructed as it was to exceed one and one-half per cent.

Mr. Lee: Object to that as incompetent, irrelevant and immaterial. This building is not a building for sale or anything of that kind.

By the Court: Overruled.

Mr. Lee: Exception.

By the Court: That is merely his opinion about it. Within the next 9 years then the depreciation would begin?

A. It would, as time went on the depreciation would be still greater.

By the Court: That is all.

(Witness excused.)

L. L. Hitt was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name?

A. L. L. Hitt.

Q. Where do you live?
A. Yale.
Q. What is your business?
[fol. 193] A. General contractor.
Q. How long have you been in the contracting business?
A. Thirty-seven years. That is, either in the lumber business or contracting business.
Q. Did you know this Norfolk school building in District 98 in Payne County that burned in 1926?
A. Yes, sir.
Q. Do you remember when the addition was constructed to that building?
A. It was '22 or '23. I wouldn't say which.
Q. There was an original building and then this addition was constructed up to it, was it?
A. It was.
Q. Did you construct that addition?
A. I constructed the addition. I did some work on the first one.
Q. I will show you these plans, Mr. Hitt, and ask you if those are the plans by which that addition was constructed?
A. Yes, sir. These are the plans drawn by Mr. Ward Fisher and I built the building according to those.
Q. Are those the specifications for the addition that you built?
A. These 29 pages are the specifications furnished with the blue print and I built the building according to those plans there and specifications.
Q. I will ask that these specifications be marked as Plaintiff's Exhibit No. 10.

(Thereupon, the specifications were so marked by the reporter.)

Q. Now, for the purpose of the record, the plans identified are marked 9 to 13 inclusive, and the specifications are marked Plaintiff's Exhibit 14. What kind of material was used in constructing that addition?
A. Brick, cement, lime, lumber of different kinds.
Q. What was the size of that addition?
A. The addition was practically 56 foot this way and 52 foot that way, or 54; I wouldn't say which.

Q. Can you tell me what the size of that original building was?

A. It was 56 feet east and west, I think it was, and 52 or 3 or 4 feet north and south.

[fol. 194] Q. Was the addition one or two stories?

A. Two stories.

Q. Was the original one or two?

A. Two stories.

Q. Can you, in your experience as a contractor, tell me about what that building, that addition was worth when it was completed?

A. The addition was worth——

Q. Tell me first whether or not you can?

A. Yes, sir.

Q. About what was that addition worth when it was completed?

A. Well, if you will make the figures I will tell you what it cost.

Q. You make those and then tell me as near as you can what the value of that addition was when it was completed.

A. The part that I had to do with, OK'd the bills and contracted the labor part of it cost——

Mr. Thurman: We object to the cost because it is immaterial and does not tend to prove values.

By Mr. Anderson:

Q. Disregard the cost, and tell me if you can in your judgment as a contractor, having constructed that addition, the value of the addition when it was completed.

A. $58,000.

Q. That is for the addition alone?

A. For the addition alone.

Q. And not taking into consideration the original building.

A. Not at all.

Q. When was that addition completed?

A. It was in 1923, I think. I wouldn't say whether it was in 1922 or '23.

Q. Do you recall when it burned, January 2, 1926?

A. It was right at the first of January, 1926.

Q. Can you tell me about how much the depreciation would have been on that addition from the time you completed it down to the time it burned?

A. In general numbers——

Q. Tell me first whether or not you can.

A. Yes, sir. I can tell you the usage; the general usage, the way we estimate and figure.

[fol. 195] Q. What in your judgment would have been the depreciation on that addition from the time it was constructed until the time it burned?

A. Between five and eight per cent.

Q. On the entire?

A. The entire thing, yes, sir.

Q. Do you know the character of construction on the original building?

A. I do.

Q. Of what kind of material was it constructed?

A. It was constructed of cement, lime, brick, lumber and a tile roof.

Q. The character of material, was it first class?

A. The very best of its kind.

Q. When did you see that building last before it burned?

A. I couldn't tell you the date, but I see it every week, or did see it every week, I believe from the time I finished it until it burned.

Q. From your work there in constructing that addition and your observation of the original building and the times that you saw it, from that time until the time it burned can you as a contractor tell me about what that original building was worth at the time it burned?

A. The original building?

Q. Yes, as distinguished from the addition. Tell me first whether or not you can.

A. I can answer you this way. At one time we figured on a floor contract and everything, and I know what I figured the walls and ceilings and everything.

Q. I am afraid they would find fault with that. Can you tell me about what that original building was worth in your judgment?

A. I know what it was worth.

Q. What was it worth?

A. $44,000.

Q. At the time it burned, you mean?

A. Yes. Now, understand I mean it could have a small depreciation the same as the other, three or four or six or

eight per cent, something like that, but I mean at the time $44,000, that is what the building would be worth.

Q. That is your judgment of its value when it burned?

A. Yes, sir.

[fol. 196] Cross-examination.

By Mr. Thurman:

Q. Mr. Hitt, your work you have testified about included not only the building of the addition but also the re-modeling of the main building, the old building?

A. Yes, sir.

Q. You took the roof off of the old building and put on a composition roof?

A. Yes, sir.

Q. That is entirely?

A. Entirely.

Q. The roof of the old building is gone?

A. It was out of the way. We took it down.

Q. Did you notice the floors in the old building when you were there?

A. Yes, sir.

Q. They were well worn, weren't they?

A. They were worn some, naturally.

Q. And in some places they were splintered?

A. I wouldn't say they were splintering.

Q. I mean splinters coming loose on the floor, is what I mean.

A. The floors were in fairly good shape.

Q. How about the plastering?

A. The plastering was repaired. You will understand the reason I had to repair it. There were several rains on that building when I had the roof off.

Q. That was when the roof was off of the main building?

A. Yes, sir.

Q. It soaked the plastering and it had to be repaired. The plastering was pretty well marked up too where the little folks were playing?

A. You will understand that up a ways there was a wainscoat, and then the blackboard. I don't think you could say the plastering was marked up at all other than the blackboard.

Q. The blackboard didn't go out in the hall, did it?

A. No.

Q. Those walls were pretty well marked up, weren't they?

A. I don't remember that they were extra bad.

Q. It has been your experience that depreciation on school [fol. 197] buildings, the average school buildings, is more than on any other kind of a building, isn't it?

A. They have hard usage. There is no question about that.

Q. The depreciation is greater, that is your experience.

A. Well, it is no greater than any other public building as far as that is concerned.

Q. I am talking about the average.

A. Yes, any public building.

Q. In making these changes in the old building in addition to removing the old and putting a new roof on?

A. Yes, sir.

Q. The frame down and the second floor joint? [joist]

A. How is that?

Q. I am reading to you from the specifications, as I understand it.

A. What part of the specifications?

Q. "Purpose." Under the heading "Purpose." Under the other heading of "General conditions," the purpose of these specifications may accompany drawing, set forth in plans and details in addition to the present building and certain changes to be made in the present building, such changes include removal of the old roof and roof frame down to the second floor ceiling joist.

A. Yes, sir, that is right, down to the second ceiling joist.

Q. You did that?

A. Yes, sir.

Q. You took the roof and frame?

A. I didn't understand at first what you were getting at.

Q. Down to the second ceiling joist?

A. Yes, sir.

Q. And you had to remove a part of the masonry?

A. The north wall.

Q. Practically all of the north wall?

A. Yes, sir, we did remove it.

Q. Now, did you do anything else to the old building other than what I have just mentioned and the replacing of the plastering that came loose or had to be exposed on account of the rain?

A. I re-arranged the stairway.

Q. You took out the old stairway and built a new one, the stairway from the first to the second floor?

[fol. 198] A. Well, yes, sir, from the first to the second floor.

Q. That made necessary further replastering from between the first and second floors?

A. And the wiring had something to do with the replastering too.

Q. Did you put in any wiring in the old building, electrical wiring?

A. We had to put some wiring in to take care of the stage. The stage came back in the room, in the old room.

Q. And in doing that you put the wiring in the ceiling and had to tear out the plastering in order to get to it?

A. Ceiling and walls, too.

Q. When the walls were damaged by these rains that came while the roof was off?

A. Yes, sir.

Q. Were the ceilings damaged at the same time?

A. The entire top ceiling of the roof. I mean the ceiling joists up there, we took the entire ceiling off of it.

Q. Did some of it fall?

A. Not very much of it but it was loose and I just took and re-nailed the lath.

Q. Did that plastering falling off of the ceiling and walls better the cond-tions [conditions] of the floor any?

A. It didn't hurt them any.

Q. Didn't hurt them?

A. No, sir.

Q. You know that the ceiling leaked and the water came in on the floors during those rains.

A. Some, yes, sir. The floors had been oiled well, though. It didn't swell the floor up.

Q. And the falling of the plastering and taking it off after these floors had ben soaked with the rain didn't affect them at all.

A. It didn't swell them up any. They didn't buckle up or anything that way. The floors had been well oiled. Understand, we didn't have any gushers or anything that way. We just had some rain.

Q. Well, you had enough that you know it did go through the ceilings and wet the floors?

A. I know I took the plastering down on the ceiling. I know that much.

Q. Do you know that any water got on the floors?

A. Some.

[fol. 199] Q. So even you know some water got on the floors?

A. Yes, sir.

Q. Now, you stated in answer to counsel's questions that you knew the value of this new addition when it was completed.

A. I did.

Q. By you.

A. I did.

Q. And you answered that you knew as you had figured the cost. Wasn't that your statement?

A. Yes, sir.

Q. And then you answered that the value was $58,000.

A. That is it.

Q. And that is based on what you remember as to the cost, is it?

A. It is what I know as to the cost.

Q. Then the value of the addition which you put on it as estimated by you or stated by you——

A. It wasn't estimated.

Q. Included the cost of putting the roof on the old building, repairing the plastering, tearing down the stairway and building in a new one and putting the wiring and plastering back in the old building, don't it?

A. I can tell you what the roof and building cost.

Q. I didn't ask you that.

A. I didn't understand the question. I thought you were just talking.

(Question read.)

A. No, sir.

Q. It does not?

A. No, sir, does not.

Q. You are now saying that the cost of the addition was $58,000 in addition to the work you did on the old building?

A. Practically that is right, yes, sir.

Q. What do you mean practically?

A. I didn't say it was $58,200.02, but approximately $58,000 in round numbers.

Q. In addition to the $58,000, you also got paid for the work you did on the old building?

A. I got quite a bunch of extra work.

Q. And you did get $58,000 for the new building.

A. I didn't say I got that.

[fol. 200] Q. Weren't you the contractor?

A. I was the contractor on the labor, on the brick and carpenter work only. I know the other part of it because I had to OK the bills.

Q. Did any others bid on that work besides you?

A. There was one other bid when I bid.

Q. One other bid when you put in your bid?

A. Yes, sir.

Q. Can you remember now how you found out or where you found out that bids were going to be received on that building?

A. It was published.

Q. In what paper?

A. Well, I saw it in the home paper, and another fellow said he saw it in there.

Q. I am just asking you where you know it was published.

A. I saw it in the home paper.

Q. What paper?

A. The Yale Record, to the best of my recollection.

Q. Do you know about when that was?

A. Well, sir, I don't remember the exact date.

Q. Do you remember when the bids were opened?

A. I don't remember the axact date.

Q. Do you remember when the contract was executed?

A. You mean the minutes?

Q. Between you and the board, the minutes and date, etc.

A. No, sir, I don't recollect the minutes.

Q. Do you remember about it?

By the Court:

Q. Do you remember the occasion?

A. Yes, sir, I remember the occasion.

By Mr. Thurman:

Q. Do you remember about when it was?

A. I don't know; I couldn't tell you.

Q. Was it in 1923?

A. I wouldn't say whether it was '22 or '23.

By the Court:

Q. How long was it before you built the building?

A. Just as soon as I could make bond. About six or seven or eight days and commenced work.

By Mr. Thurman:

Q. You said in your judgment the depreciation on that [fol. 201] building from the time it was built until January 2, 1926, would amount to between five and eight per cent.

A. Somewhere along there. That is general usage.

Q. Does that general usage apply to school buildings?

A. Well, I wouldn't say whether it would or not, but general usage is what the insurance companies figure, depreciation on the buildings.

Q. Well, I am asking you now whether or not the depreciation on this building, this school building, for school purposes, would not be greater than the ordinary depreciation figures on other buildings of the same character?

A. Well, it wouldn't be any greater than public buildings.

Q. Yes, you testified to that once before but I am asking you now about buildings generally.

A. Well, that class of buildings, you would not use for a residence or anything like that and I don't know that I could answer.

Q. All right, if you can't answer. Now, you stated that you knew the value of the original building January 2, 1926, was $4,000.

A. Yes, sir.

Q. How did you get at it?

A. Well, they wouldn't let me answer that awhile ago.

Q. I am asking you now.

A. Shall I answer?

The Court: Answer it.

A. At one time they were figuring on letting a full contract on that, and I figured on the walls and ceiling and floors and everything, what the old building was worth after I got the roof off of it and take the repairs I did, and

so forth, and the old part was worth $38,000, and I done put $6,000 new work on it so it would be worth $44,000.

Q. At that time they were figuring on tearing it down and building one building to take the place of the old one and the new addition?

A. No, sir. We were figuring on someone taking the full contract of everything and I figured the salvage would have to be put in.

Q. What do you mean by taking the full contract on everything? You mean on the repairs to the old building and the building of the addition?

A. You would first have to wreck part of the old build- [fol. 202] ing you had. Then you would have to go immediately and build a new building. Then you would have to build a new building and join it up to the old part you had left.

Q. So that after the building of this addition you don't mean to tell the court and jury that that building consisting of the old building and the addition to it was worth what the old building originally cost plus what the new building cost?

A. I didn't say what the old building originally cost.

Q. I am asking you now. As a matter of fact, after you got through with your work building and repairing the old building and building the addition, the combined building, what you left there was not actually worth as much as the old building, the original cost and the new building originally cost?

A. I didn't say what the old building originally cost.

Redirect examination.

By Mr. Anderson:

Q. When you completed that addition that you built, what, in your judgment, if you can tell me, first tell me whether or not you can, can you tell me what the original building and the addition, after you completed the addition, what was that entire structure worth when you got through with the addition?

A. It was worth $88,000.

Q. That was in 1923?

A. That was the assertion I made to Mr. Walterhaven, the clerk, when he asked me how much insurance he could carry. I told him he could carry the value of $88,000.

Q. That was your judgment of the value of the completed structure, old and new?

A. It was worth it.

Q. You were asked about having taken the north wall out of that old building?

A. Yes, sir.

Q. That was necessary, was it, in joining on that addition?

A. Yes, sir, I can show you by the plans.

Q. You say you took the roof off of that old building?

A. Yes, sir.

Q. Was that because the roof was bad or was that necessary in tying it in with the addition?

A. It was necessary to make it look like the blue print [fol. 203] there; it was necessary to take it off to make the building conform one with the other.

Q. To make one roof?

A. To make one roof cover the whole thing.

Recross-examination.

By Mr. Thurman:

Q. That was a composition roof you put on, wasn't it?

A. It was tar and gravel roof; a 15 year guarantee, I believe it was.

Q. What did you do with the old one you took off?

A. Well, I am not in position to say. I didn't have it. It wasn't mine.

Q. Well, it was sold, was it?

A. I don't know the trade the school board made with the old roof and old tile.

(Witness excused.)

(Hereupon, the jury was given the usual admonition by the Court, and court adjourned until 9:30 o'clock A. M.

Proceedings, 9:30 o'clock A. M., January 15, 1929

R. M. Bailey was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. State your name.
A. R. M. Bailey.
Q. Where do you live?
A. Norman.
Q. What is your business?
A. Contractor.
Q. Do you have a company?
A. Yes, sir, the Bailey-Burns Construction Company.
Q. How long have you been in the contracting business?
A. Well, about seven years we have been organized.
Q. Did you build a school building for School District 98, of Payne County since January 2, 1926?
[fol. 204] A. Yes, sir.
Q. In building the new building did you have occasion to and did you examine what was left of the old building that burned on January 2, 1926?
A. Yes, sir.
Q. What was left of it after the fire?
A. The walls were left standing.
Q. In what condition were they?
A. Bad, broken, badly burned.
Q. Did you examine the foundation that was left?
A. Down to the foundation.
Q. Did you make any of the foundation itself?
A. Only down to the top of the foundation because the floor where it was excavated out, it dug down to the foundation at that point.
Q. Can you tell me about what the salvage value of the old building was after the fire, don't tell me what it was, but can you tell me?
A. I can tell you exactly.
Q. All right, how much was it?

A. Well, it was, after tearing down and what we could put back, it was approximately $200; the cost of tearing it down, removing the debris, rubbish and cleaning up, approximately $200 over what it cost us to tear it down and clean it up.

Q. Was the school district given credit for whatever the value was?

A. Yes, sir.

Cross-examination.

By Mr. Lee:

Q. The new building was not built on the same dimensions or the same plans as the old building, was it?

A. No, sir, not exactly.

Q. For that reason you could not use the foundation.

A. No, sir, not for that reason. I wouldn't consider the foundation safe to have used.

Q. What was the matter with it?

A. The fire had dropped down into it, on top of it, and I would not consider them safe to rebuild a building on them.

Q. No part of the foundation?

A. It would have been possible, the south end, probably one end of it, I would not consider any other part of it [fol. 205] would have been used. It might have been, but it would have been taking a long chance.

Q. What was done with the salvage from that building?

A. The brick, what could be cleaned up, was used.

Q. How many thousand of them?

A. I don't remember exactly because I haven't got my book with me, but I do know when we were determining how many were left, what they were worth or what they cost us to clean them up.

Q. That is your opinion on the value?

A. That is the way we figured it, at actual cost.

Q. But you can't tell this jury how many thousand of those brick you used?

A. No, I can't off hand. I could have gotten that from my bookkeeper.

Q. Do you know how many thousand new brick you bought?

A Not off hand I don't know. I know we bought all new faced brick, and I would say possibly two-thirds of the columns.

Q. You think probably you used enough of the old common brick that were salvaged out of the old building to supply one-third of what you needed in the new building?

A. You understand they were not clean when you got them. You had the labor of cleaning them up.

Q. I understand that, but they were used in the new building?

A. Yes, sir.

Q. What dimensions were this new building?

A. I don't remember that. I don't remember the dimensions.

Q. Why didn't you bring your figures and records?

A. I was not asked to bring them. I didn't know what line I was going to be asked about, what questions I was going to be asked.

Q. And what you have testified to is just your recollection in the matter?

A. No, that is my knowledge of it because I remember what we allowed the school board for them.

Q. Who helped figure that allowance on the salvage?

A. Mr. Burns, my partner, and Mr. De Long, our superintendent.

Q. Who for the school district?

[fol. 206] A. I don't recall. We gave them our figures.

Q. You just figured up what you wanted to allow them and gave them your figures?

A. I beg your pardon. I will tell you who that was. After the brick were cleaned and piled, before one of them was used, Mr. Quigley and Mr. DeLong counted the brick. Then we figured what it had been worth to clean them and allowed them the difference in the price of new common brick.

Q. The difference in the price, how do you mean?

A. In other words, if it cost us $7 a thousand to clean them, if we could buy common brick for $13, we paid them $6. I don't remember the exact figures what it cost to wreck and remove the building, but the only salvage we had left was the brick. But taking that as an example, if it cost

us $5 a thousand and we could buy new ones for $13, we would allow them $8. If it cost us $10 for removing the rubbish and cleaning the brick we would allow them three. Whatever the difference would be.

Q. You say you don't remember what it cost you per thousand?

A. No, I don't remember the exact cost.

Q. Do you remember what the price of common brick was?

A. I think the price of common brick at that time was $13 or $13.50.

Q. Do you remember the cost of the face brick?

A. On that job?

Q. Yes.

A. Well, the face brick we bought new, and I don't remember, but I think if I am not mistaken, about $25 or $26. It might have been more or less, I don't remember what we paid for the new face brick on that job.

Q. You say you don't remember the dimensions of this new building?

A. No, I do not.

Q. Do you remember the thickness of the walls? In the new building.

A. The thickness of the walls in the new building I think was fifteen inches or seventeen, possibly. Seventeen to the first story, or rather to the bottom of the joist of the second story, and thirteen from there on up. That is my memory. I might be incorrect, however.

Q. You say you have been in the contracting business about seven years?

[fol. 207] A. For myself.

Q. What part of this contract of building this new building did you have?

A. The new building, all of it.

Q. And when and how did you learn that this building was going to be built?

A. The first I heard of it was a gentleman by the name of Rookstool told me about it, and the next I think I saw an advertisement in the Oklahoma Contractor.

Q. When was that?

A. Well, that was in the summer of 1926, I think. I don't remember the exact date. In the fall or summer of 1926.

Q. When was this new building built?

A. In the fall of 1926.

Q. Were there any other bidders besides you?

A. Yes, sir.

Q. Who were they?

A. I can't recall all of them but there was the Manhattan Construction Company, the Krepcke Construction Company, ourselves, and I think two or three others, but I don't remember who all bid. I am not positive, some six or seven.

Redirect examination.

By Mr. Anderson:

Q. The Mr. Quigley you speak of who helped examine this old brick and determine what it would cost to clean them and count them, was Mr. Quigley who was a member of the school board?

A. Yes, sir.

(Witness excused.)

J. E. QUIGLEY was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name?

A. J. E. Quigley.

Q. Where do you live?

A. I live at Cushing.

Q. Are you a member of the school board of School District 98, Payne County?

A. No, sir. I used to be.

[fol. 208] Q. You used to be?

A. Yes, sir.

Q. When were you a member of the school board, Mr. Quigley?

A. Well, let's see, I was elected in 1924, I believe.

Q. When did you cease to be a member, approximately?

A. Well, last September a year ago.

Q. You don't live in that district now?

A. No, sir.

Q. You live at Cushing? Do you remember the occasion of the school building in School District 98, burning in January, 1926?

A. Yes, sir.

Q. What was the date it burned?

A. January 2nd.

Q. Now to what extent was it destroyed, if you know?

A. Well, everything except the walls.

Q. Was there anything in the building that was saved?

A. No, sir.

Q. What time in the day or night did it burn?

A. Well, it was reported to me about five o'clock in the morning.

Q. After the school building burned did anyone, so far as you know, connected with the insurance companies, come up and examine what was left of the building?

A. Well, yes, there was a fellow by the name of Cableman, [Kebelman] I believe.

Q. Do you know about when he was up there?

A. Well, sometime the latter part of January. It could have been possibly the first of February, but it was either the last of January or the first of February.

Q. Did you see him examining what was left of the building?

A. Yes, sir.

Q. Did you have any conversation with him in connection with his examination of what was left?

A. I did.

Q. Tell the jury what was said between you and Mr. Cableman [Kebelman] with reference to the remains of that building.

Mr. Lee: The defendants object to that as incompetent, irrelevant and immaterial, the agency of Mr. Cableman [fol. 209] [Kebelman] not having been ascertained, and for

the further reason that it is hearsay and not binding upon the defendants or either of them.

By the Court: Overruled.

Mr. Lee: Exception.

A. Why, myself and Mr. Langston and Mr. Cableman [Kebleman] was on the ground there, in fact, we were standing out there close to the ruins of the fire, and Mr. Cableman [Kebleman] just barely mentioned—he said now, "This wall is good from the window sills down." He said, "That is all right, isn't it?" And I said, "Now, Mr. Cableman, [Kebleman] I don't know. Let's go down in the basement and examine it and see," so we walked down into the basement and along the walls I commenced pulling out the bricks with my hands. I says, "Now, Mr. Cableman, [Kebelman] doesn't that look like a sound wall?" He says, "No, really it doesn't." That is the conversation.

Mr. Thurman: The defendants move to strike the answer of the witness for the reason given in the answer to the question.

By the Court: Overruled.

Mr. Thurman: Exception.

By Mr. Anderson:

Q. Did the adjusters for the insurance companies come up after that time?

A. Yes, sir.

Q. And discuss the matter with the school board?

A. Yes, sir.

Q. About when was that?

A. Well, the latter part of February.

Q. And where was that meeting held?

A. In the teacherage at the school house; in the school house yard.

Q. What adjusters were present at that meeting and participated?

Mr. Lee: The defendants and each of them object to that for the reason the same is incompetent, irrelevant and immaterial, and assuming a state of facts not proven and no agency of the alleged adjusters having been shown.

By the Court: Overruled.
Mr. Lee: Exception.

[fol. 210] By Mr. Anderson:

Q. Go ahead.
A. Well, Mr. Fuller——
Q. Is that the Mr. Fuller there?
A. Well, I think so.
Q. And Mr. Kline over here?
A. I believe so.
Q. At the counsel table?
A. The other man, I don't just recall his name to memory. Mr. Cableman [Kebelman] was with them.
Q. That is the same Mr. Cableman [Kebelman] that had been there before?
A. Yes, sir.
Q. Who else was at that meeting?
A. Well, myself, Mr. Langston, Mr. Edge and Mr. Perswell were there.
Q. Who was Mr. Perswell?
A. He was superintendent of schools at that time.
Q. And you were a member of the board at that time?
A. Yes, sir.
Q. Now that meeting was held where?
A. In the front room of the teacherage.
Q. That is the residence in which the superintendent lives?
A. Yes, sir.
Q. It was also owned by the school district?
A. Yes, sir.
Q. Now, tell this jury just what occurred at that meeting, what was said by the adjusters and who said it, and what he said to them.

Mr. Lee: To which the defendants and each of them object for the reason the same is incompetent, irrelevant and immaterial and hearsay, the agency of the said purported adjusters not being shown, and the same is not binding upon the defendants or either of them.
By the Court: Overruled.
Mr. Lee: Exception.

A. Well, we met there in the morning about eight or nine o'clock, I should judge, and Mr. Fuller and Mr. Cableman [Kebelman] and Mr. Kline and this other gentleman, I can't think of his name.

Q. To refresh your memory, I will ask you if it was Mr. Mullens.

[fol. 211] A. That is who it was. We met there, I and Mr. Langston and Mr. Edge, I believe, Mr. Edge got there a little before the party that was to meet, so I understood, coming over from Drumright. We waited some fifteen or twenty minutes, and they finally drove up. After the introduction we all went into the house and Mr. Fuller said, "Well, boys, let's get busy," so he taken out some papers, in fact, I believe all the boys had a few figures. They made some calculations. Mr. Cableman [Kebelman]—Mr. Fuller said to Mr. Cableman [Kebelman], he said, "Have you your figures ready?" And he said, "Yes, sir." He said, "Let's have them," so he taken out some figures on some papers and handed it over to Mr. Fuller. He looked over it after asking Mr. Cableman [Kebelman] several questions in regard to it and he said, "Well, we can reconstruct a new building for"—I believe he said $55,000, and he said "Mr. Cableman [Kebelman] will contract with you members of the board to replace your building for $55,000, I believe." Well, I spoke up and says, "Mr. Fuller, is Mr. Cableman [Kebelman] a real contractor?" and he said, "Yes, sir, he is." And I said, "Well, you reserve the right to replace the property in your policy and so long as you reserve that right why if you insurance companies go ahead and contract with Mr. Cableman [Kebelman] and that will more than please the board," and Mr. Fuller said, "We never have done business that way and we don't never aim to," but he repeated the question that the board could contract with him and I remember saying "Well, I don't know him," and as far as I was concerned I wasn't willing to do that.

Q. What further occurred?

A. Well, the board went outside for a little conference, and after that was over I was instructed by the other two members of the board to go back in the room and tell the boys we could not accept their offer.

Q. Did you tell them that?

A. I did.

Q. Then what was said?

A. Well, Mr. Fuller just remarked—well, he just asked, "What are you going to do?" Well, I said, "It looks like a loss". That is the way I remember the conversation.

Q. Did anything further occur at that meeting; was that the end of the meeting?

A. Well, about so, yes.

Q. Did you help them count the bricks that were taken out of the old building?

[fol. 212] A. Yes, sir, I helped to invoice that stock with Mr. Long, [De Long] the foreman that was reconstructing the new building.

Q. That was the foreman of the Baily-Burns Construction Company that built the new building?

A. Yes, sir.

Q. How much did the school board get out of that old building as salvage, if you know?

A. I think $200.

Cross-examination.

By Mr. Lee:

Q. What experience had you had with brick up to that time, Mr. Quigley?

A. None whatever.

Q. Did you know the value of these bricks that you helped count?

A. Well, at that time I knew the price of new brick.

Q. Were you there on that job while they were wrecking this old building?

A. Where they were wrecking?

Q. Yes.

A. Not all the time, no, sir.

Q. Do you know how many men they had employed in wrecking these walls?

A. No, sir, I don't.

Q. Do you know how long they were doing it?

A. No, sir.

Q. Do you know how many men they had employed cleaning this brick after they wrecked the walls?

A. No, sir.

Q. Do you know how long they were doing that?

A. No, sir.

Q. You don't know anything about the amount of work required or the expense of wrecking these walls and cleaning this brick, do you?

A. I had the record I kept there by the——

Q. You had their record?

A. Yes, sir.

Q. The school board didn't have anyone there helping keep a record, did they?

A. No, sir.

Q. They didn't have anyone there representing them at [fol. 213] the time this wrecking was done or these bricks cleaned up until the time they were counted, did they?

A. Our school superintendent was there on the ground with instructions to look after the interests of the district; instructed by the board to look after the interests of the district.

Q. Your school superintendent?

A. Our school superintendent, Mr. C. E. Perswell.

Q. What else was he doing at that time?

A. He was teaching school, the superintendent of schools.

Q. Superintending the schools?

A. Yes, sir.

Q. Did he do any teaching?

A. I believe he had one class; I think so.

Q. His time during the school hours was taken up by school work, wasn't it?

A. I imagine so.

Q. Do you know what experience he had had in building?

A. No, sir, I do not.

Q. Do you remember that the board paid him for these extra duties of superintending the interests of the School District in this building material?

A. Well, we had him employed by the year on full time and his services belonged to the district.

Q. So far as the school board itself was concerned, no member of the school board or anyone specially hired for that purpose looked after the interests of the school district in this salvage matter, did they?

A. No, sir.

Q. Now, do you remember how many thousand of those bricks were used in the new building?

A. I don't call that to memory. I don't remember.

Q. Do you remember how much per thousand you were allowed for those old bricks?

A. It seems to me, I wouldn't say for sure, whether it is six, eight or eight and a half, but I really believe it was eight dollars.

Q. Eight dollars a thousand?

A. Yes.

Q. You don't remember how many thousand?

A. No, sir, I don't.

Q. Do you remember the dimensions of the new building? [fol. 214] A. No, sir.

Q. You have no record of this with you?

A. No, we haven't the plans here, no.

Q. Now, at the time you say this meeting took place between the school board and Mr. Fuller, and Mr. Kline and Mr. Mullens, and Mr. Cableman, [Kebelman] who else was present there at that meeting besides the members of the board and Mr. Fuller, Mr. Kline, Mr. Cableman [Kebelman] and Mr. Mullens?

A. Mr. Perswell.

Q. Anyone else?

A. Mrs. Perswell was there in an adjoining room. There is a colon-ade between the two rooms. She was in the adjoining room there.

Q. Anyone else?

A. I don't remember there was.

Q. Now, do you remember how this meeting was arranged?

A. Well, all I know, Mr. Langston called me over the 'phone and told me there had been some adjusters called him from Drumright, and asked for a meeting with the board the next morning and requested me to be there.

Q. And you were there?

A. I was there.

Q. Now, had you or any member of the board consulted attorneys prior to that time?

A. No, sir.

Q. Who opened the conversation there after you got into this meeting?

A. Sir?

Q. Who started the conversation after you got into this meeting?

A. Mr. Fuller.

Q. And what did he say?

A. He says, "Well, boys, let's get busy".

Q. Then what was said next?

A. Well, there wasn't a great deal of talking done there for a little bit, for they made some figures on a paper there on the table. In fact, they were all figuring a little bit.

Q. Had you members of the school board done any figuring?

A. No, sir.

Q. You had not done any figuring?

[fol. 215] A. No, sir.

Q. Had you consulted any architect or contractor?

A. No, sir.

Q. This was about fifty days or something like that after the fire, wasn't it?

A. In that neighborhood, yes.

Q. Now, you say up to the time of that meeting you had not figured or consulted anyone with reference to the figures on this building?

A. Well, the only thing we had done, we had secured some figures of the purchase cost of the movable furniture and the stationary furniture in the building.

Q. But as to the building proper you had secured no figures from anyone?

A. No, sir.

Q. And had not done any figuring yourself?

A. No, I didn't know how to figure.

Q. Then at the time of this meeting the only figures you had were the figures you had secured on the movable furniture and fixtures and the permanent furniture and fixtures that were in the building?

A. And the actual cost, the actual purchase cost on the whole building.

Q. The actual purchase cost?

A. Yes, sir.

Q. Where had you got those figures from?

A. Got them from the county superintendent and county treasurer's office.

Q. Were you a member of that school board when the original building was built?

A. No, sir.

Q. Were you a member of it when the addition was built on it?

A. No, sir.

Q. So you don't know anything about how the contract was let for the addition on that building?

A. No, sir.

Q. The only information you had with reference to that old building or the addition built on it, in 1922 or 1923, was what you obtained from the county records at the county seat?

A. Cost value, yes, sir.

[fol. 216] Q. And that information consisted only of the cost price of those buildings, didn't it?

A. That is all.

Q. Now, as to the value of those buildings at the time they were built, you yourself didn't know, did you?

A. No, sir, I didn't.

Q. The only information you had relating to the value was the cost price?

A. Naturally that is all, yes, sir.

Q. Now, did you or any of the other members of the board to your knowledge submit any figures to the adjusters, as you call them, Mr. Fuller, Mr. Kline and Mr. Mullens?

A. I think not.

Q. Now, after Mr. Fuller had said, "Well, boys, let's get busy," what did you say then?

A. Well, they figured there on the desk awhile and Mr. Fuller asked Mr. Cableman [Kebelman] if he had his figures ready and he said he did, so he said, "Well, let's have them," and they got out some more figures and went over them, and Mr. Fuller asked Mr. Cableman [Kebelman] several questions in regard to them.

Q. Do you remember those questions?

A. Well, he asked him if he had a price on material and he said yes, and I believe—well, just what they were I don't recall, but they talked quite a little but back and forth to one another about those plans and about these pictures he had made, and just what was said I don't remember. It has been three years ago.

Q. Did Mr. Cableman [Kebelman] say these figures represented the total cost of rebuilding the building anew, that building?

A. Yes, that is what he said.

Q. And what did you say the amount was that they stated to you at that time?

A. The best I remember was the value of reconstruction as they put it there, $55,000, less the depreciation brought it down to $52,000, the way I remember Mr. Cableman [Kebelman] and the contract for $55,000 and the adjusters were willing to pay in the neighborhood of $52,000.

Q. Something like $2500 or $2600 that is figured off for depreciation, isn't there?

A. Something like that, $3000 or something like that. I don't remember just the exact figure.

Q. Now, did any of you members of the board say any- [fol. 217] thing about the amount of depreciation that they figured at that time?

A. I don't know as they did.

Q. Did you at any time later?

A. Well, I just merely mentioned to Mr. Fuller, I thought they were taking off way too much; $15,000 or $20,000 was too much off for depreciation of the building.

Q. When did you say that?

A. During this meeting.

Q. $15,000 or $20,000?

A. Yes, sir.

Q. Well, did they say anything about depreciating the building $15,000 or $20,000?

A. Well, they were offering us $52,000 and as I recall it the insured value of it was $70,400 on what we lost.

Q. Mr. Cableman [Kebelman] said he would build you a new building for the $55,000, didn't he?

A. He did.

Q. Of the same limensions and same specifications as the old building, that is as the building had been prior to the fire?

A. Yes, he said he would build it back for $55,000.

Q. Out of new material?

A. Well, he didn't say whether it would be new material or not, but you would naturally suppose he wouldn't pick up rubbish.

Q. That was your understanding of his offer at that time, was it?

A. That was my understanding, yes, sir.

Q. You say you asked Mr. Fuller whether Mr. Cableman [Kebelman] was a responsible, sure-enough contractor?

A. I did.

Q. Mr. Fuller replied to you that he was?

A. That is what he said.

Q. Did you raise any question or did you at that time question Mr. Cableman's [Kebelman's] ability?

A. No, I raised no question as to his ability at all, no, sir.

Q. You had met Mr. Cableman [Kebelman] therefore on a previous occasion, hadn't you?

A. Once before, yes, sir.

Q. How long before?

A. Well, the way I recall it, it was sometime the latter part of January.

[fol. 218] Q. Something like at least a month before this?

A. Yes.

Q. Conference?

A. Maybe so, yes, sir.

Q. Mr. Cableman [Kebelman] at that time informed you who he was, did he not?

A. Yes, he introduced himself to us, yes, sir.

Q. Did he tell you what his business was?

A. Why yes, I think he did. I believe he said he was going to make an estimate for the insurance company as to the loss of the——

Q. Did he tell you that he was a contractor and builder?

A. No, sir, not at that time.

Q. He did not?

A. No, sir.

Q. Did you know that he was a contractor and builder at that time?

A. No, sir.

Q. You knew at that time that he was going to figure the cost of replacing this building, did you?

A. Yes, I think so. I think he said that is what his arrangements were.

Q. Did he tell you where he lived at that time?

A. I believe he did.

Q. Did you or any of the rest of the board to your knowledge investigate Mr. Cableman? [Kebelman]

A. No, sir.

Q. Have you ever done so?

A. No, sir, I haven't. I don't know what the other board members have done.

Q. So far as you know, Mr. Cableman [Kebelman] then was a responsible contractor?

A. I don't know that he was or don't know that he wasn't. It was all hearsay.

Q. Do you remember whether Mr. Cableman [Kebelman] offered to enter into a contract with the board at the time of this conference?

A. Yes, sir. He said he was ready to sign a contract.

Q. And did he state as to whether or not he was ready and willing to put up a bond?

A. He said something about a surety bond, yes, sir.

By the Court: What would be the purpose of this, the [fol. 219] effect of this testimony? You do not contend that the Board of Education would have a right to let a contract of that character, do you?

Mr. Lee: The testimony heretofore has shown that Mr. Cableman [Kebelman] offered to make a bond that he would bid the amount which he said he would to replace this building when they had properly advertised the contract from letting.

By the Court: But that would not be binding on him or the board because it is in violation of the statute. The statute of the state provides how a school board or any other public body like that may let a contract.

Mr. Lee: That is all very true. But it does not prevent this board from having an offer to bid a certain amount providing it is properly advertised and others are given an opportunity to bid on that.

By the Court: That would not be binding on the man who signed this contract because that would be equivalent to the board entering into a contract right at that time.

Mr. Lee: I beg your Honor's pardon. You evidently misinterpret the idea which we have.

By the Court: As I understand it, the effect of it is that Mr. Cableman [Kebelman] would enter into a contract and give a bond that when certain proceedings were followed

and the contract advertised that he would bid this amount. Now, I am just indicating to you that would not be binding on anybody because that would be merely another way of doing what the law says you cannot do.

Mr. Thurman: In view of the expense incurred by a board in the preliminary steps for the letting of a contract, it can always enter into an enforceable agreement with somebody that he will, in consideration of that, make a bid upon the proposed improvements, and can't be anything in our law to make that illegal where the proposition is before the board as to whether or not it will incur the expense.

By the Court: What would be the consideration on behalf of Mr. Cableman [Kebelman] to make such an agreement.

Mr. Thurman: That the board would go ahead and incur the expense of advertising.

By the Court: Your policy provides that you shall have the right to erect this building.

[fol. 220] Mr. Thurman: The policy also provides we shall never be called upon to pay more than the replacement value.

The Court: There is no reason why, as I see it, if the defendants, or the insurance companies wanted to go ahead and reconstruct that building or replace it, they could have done so without advertising or anything of the kind as a matter of contract. They could have restored the building if they wanted to.

Mr. Thurman: At the same time their officers, who are responsible to them are in foreign states where they can't look after this building.

By the Court: I appreciate that.

Mr. Thurman: They were producing a man, to show their good faith, if the Court please, who had as the evidence shows, a bid bond which compelled him whenever the school board got ready to build that building to bid the sum which he told the board he would bid; not exceeding that sum.

By the Court: That isn't binding on the board. They could listen to it, that is all.

Mr, Thurman: It is certainly evidence determining what the replacement value of that particular building was at the time of the fire.

By the Court: It would be one circumstance, yes.

Mr. Thurman: I say it is evidence.

By the Court: I am not going to exclude the testimony but I just wanted to know your purpose in offering it.

Mr. Thurman: That is it, to show the replacement value of the building.

Mr. Lee: Here is another purpose also, and that is to show the good faith of Mr. Cableman [Kebelman] in making these figures and this estimate, which were the only figures according to all the witnesses that they had on the replacement cost of this building.

By the Court: Very well. This replacement cost is often carried pretty far. That is, the estimates. Everything in the way of determining the replacement cost is determined by an estimated value of the material that would go into the new structure less depreciation. Now that is merely one circumstance. The actual testimony of what the building cost is positive testimony of the value and that could [fol. 221] be used as a basis to determine the value at any other time, less the depreciation. Those are all circumstances. One is no more binding than the other. How are you going to find out what the building will cost without building it, except by estimates?

Mr. Lee: That is very true. The main building that they built will determine the value of this old building at the time of the fire.

By the Court: No, sir, it would not.

Mr. Lee: But a responsible contractor offers to this board to replace this building with material of like kind and character and the same workmanship at the time for a given sum is binding and he offers to give a bond that he will do it, is binding.

By the Court: There is no bond exhibited. That is nothing more than a mere statement. Anybody could make that statement. A blacksmith could have made it or a barber. Anybody could have made that statement. That is not binding but it will be permitted to go in merely for that purpose, it is merely the statement of one man as to what the building could be built for.

Mr. Lee: Yes, and if we show that man is a responsible contractor, and that he had his figures and his estimates prepared, and that he was ready and willing to go ahead and carry that contract through, that is certainly a strong

circumstance in proving what the actual replacement cost of that building was.

By the Court: No, it is just the opinion of one man. You could not say to this school board, "Now, here is a man that can build you a building for $55,000." The evidence in this case so far, I believe it was the secretary who said that the building was worth more than $80,000. It came out of this same conference. Mr. Fuller said, "No, your building is over-insured." Now, the opinions of different men I think will be taken for just what they are worth, but my purpose in suggesting this to you is that you cannot bind the Board of Education to accept as the value of the replacement of that building what some man said he could do it for, because he might be just as badly mistaken as some other contractors are.

Mr. Lee: Provided that man is engaged in that line of business and has had experience, your Honor will not hold we cannot introduce his——

[fol. 222] By the Court: No, I am going to let the evidence go in, but I want it clear to the jury, and I want it clear from you as to your purpose in offering it.

Mr. Lee: May we have an exception to the holding of the Court as to the purpose for which this evidence may be introduced and considered by the jury?

By the Court: Yes. This evidence may be introduced as a circumstance to determine the replacement value of the building, but it is the opinion of the court that is it not binding upon the board as determining the replacement value.

Mr. Lee: Will the Court allow us an exception?

The Court: Exception allowed.

By Mr. Lee:

Q. Did you, Mr. Quigley, at that time have any doubt as to Mr. Cableman's [Kebelman's] ability to go ahead and build that building and put up a bond if he were given the contract?

A. Well, of course, I had no knowledge of the man at that time, as far as that goes. I didn't know. He might have been the biggest contractor in the world, as far as I knew. He was a stranger to me. He had only been introduced to me thirty minutes before.

Q. But you had met him about a month before?

A. Yes, I had met him once before for a few minutes.

Q. After he said he would replace the building for some $55,000, what next happened?

A. Well, I said to Mr. Fuller, I said, "Now, Mr. Fuller, you know Mr. Cableman [Kebelman]. You know he is an efficient contractor, and you fellows just go ahead and contract with him, rebuild the building, and it will more than please the board."

Q. What did Mr. Fuller say to that?

A. Well, he made some remark about how long he had been in the business, and he said he never had done business that way and never expected to.

Q. Then what did you say?

A. Well, just at that time I don't know as I replied to it.

Q. What was said by any of the other members of the school board at that time?

A. The way I remember it, I done most of the talking. I don't think they were saying very much.

Q. You acted as spokesman for the board and Mr. Fuller was spokesman for the other side, is that it?

[fol. 223] A. Well, not in full, no; but I think we done most of the talking.

Q. What did the board do after he said that?

A. Well, we decided among ourselves that we would not accept the offer.

Q. You say you decided. Where and how did the board decide that?

A. We stepped out on the porch and held a little conference among ourselves.

Q. And then you went back in?

A. Yes, sir.

Q. And what did you say at that time?

A. I said, "Mr. Fuller, is that all you are going to allow us and is that it?" He said, "Yes, that is it." I said, "Well, I am sorry but I am instructed by the other two members of the board to inform you we cannot accept your offer."

Q. Now, when Mr. Fuller said what the sound value of this building figured, did he say anything about the furniture and fixtures?

A. I don't remember about that. I don't remember just what was said about that.

Q. Do you remember anything about the depreciated value, replacement cost of the building and the furniture and fixtures all being added up?

A. Well, really I don't know if it was or not. I don't know whether it was all figured up or not.

Q. I will ask you if it isn't a fact that Mr. Fuller at that time after Mr. Cableman [Kebelman] had presented his figures, if Mr. Fuller didn't submit figures to you members of the board as to what he considered the sound value of the building, and of the furniture and fixtures?

A. If Mr. Fuller didn't do that?

Q. Yes.

A. Well, now they had some figures there. I never went over the figures myself. They were all making figures there on the board, and he had it figured up out there on a piece of paper. I had the paper in my hand once and about the only thing I remember about it was the grand total. In fact, that is about all I looked at.

Q. What was the grand total?

A. $52,000 and something.

Q. That was on the building alone, wasn't it?

A. As I remember it, yes, sir.

[fol. 224] Q. Don't you remember about him figuring also a grand total on both the building and furniture and fixtures?

A. Well, I just don't call that to mind right now.

Q. Wasn't that figured and were not those figures presented to the board before you members of the board stepped outside to hold your conference?

A. Yes. We had saw the figures before we went outside, yes, sir.

Q. And you saw them on the furniture and fixtures as well as on the building, didn't you?

A. Possibly so. I don't remember about that.

Q. Didn't Mr. Fuller just before you members of the board went out to hold your conference say to you that if you were willing to settle on that basis, that they would take proofs of loss and submit them to the company?

A. Well, just what the conversation was I don't remember, but I was lead to believe that is what they would pay us.

Q. And they would submit proofs to the company?
A. So far as that conversation is concerned, I don't remember. I don't recall it.

By the Court:

Q. What do you mean by saying that is what you were led to believe?
A. Well, by the conversation there.

By the Court:

Q. What was it you believed?
A. Well, I believed they were willing to pay us $52,000 and a little over for the building. That is the way I thought.

By Mr. Lee:

Q. Do you remember any of the conversation about the furniture and fixtures?
A. There was a little discussion there between Mr. Fuller and Mr. Perswell about the furniture and fixtures. The way I recall it now there was a little discussion there as to what was movable and what was stationary, what was a part of the building and what was movable but just what was said I don't remember.
Q. Was there any dispute between the board and Mr. Fuller or Mr. Kline or Mr. Mullens about the value of the movable furniture and fixtures?
A. No, the way I remember it, I believe they said we were under-insured on our movable furniture.
Q. There was something said?
A. I believe they did say that, yes, sir.
[fol. 225] Q. What was said about the permanent furniture and fixtures?
A. There was a little discussion there as to what was movable and what was part of the building, but I don't just remember the conversation.
Q. Part of the conversation has come back to you and I want to ask you a question to refresh your memory, if it does not recur to your mind now that Mr. Fuller did make you a proposition before you went out to your conference outside the building, that if the board was satisfied with the figures on the building and the furniture and fix-

tures, that they would take proofs of loss in that amount and submit them to the company?

A. Well, I don't remember about that conversation, about taking proofs of loss. I don't call that to mind.

Q. Well, you wouldn't say that didn't take place?

A. It could have.

Q. Now, after this conference, what else happened, to your knowledge, with reference to this loss?

A. After the board was on the outside of the building, is that what you mean?

Q. No.

A. The conference with the adjusters?

Q. After you parted there and the conference between you and the board, and Mr. Fuller, Mr. Kline and Mr. Mullens had broken up, what happened later?

A. Well, right away the board left, I and Mr. Langston, I believe, drove down together. We went on home and Mr. Edge left about the same time.

Q. Now, do you remember of communicating in any way with either Mr. Fuller, Mr. Kline or Mr. Mullens or either of the defendant companies after that conference?

A. No, sir.

Q. You did not as a board, or as individuals, so far as you know, thereafter submit any figures of any kind to the defendant companies or to Mr. Fuller, Mr. Kline or Mr. Mullens, did you?

A. Well, personally I didn't.

Q. Well, did the board to your knowledge?

A. Well, now, not to my knowledge.

Q. If anything of that kind was done you did not participate in it?

A. No, sir.

[fol. 226] Q. Now, you were present at all of the meetings of the board, weren't you, their business meetings?

A. Well, I couldn't say all of them but most of them.

Q. At about that time this matter you considered of a good deal of importance, did you not?

A. I think I attended all of the regular meetings along about that time.

Q. And was there any action taken by the board after this conference you have told about looking to the submission of any figures to the defendants or to Mr. Fuller and Mr. Kline and Mr. Mullens?

A. Not to my knowledge, no, sir.

Q. Did you have a conversation with Mr. Cableman [Kebelman] at that time in which he said that he would like to know when the contract for this building was to be let?

A. I don't remember that I did.

Q. Did you hear any such conversation with any other of the members of the board?

A. I don't remember that I did.

Q. Do you know whether or not the board did send Mr. Cableman [Kebelman] any notice of the letting of the contract?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Overruled.

Mr. Anderson: Exception.

A. Well, I didn't send him any notice. That advertisement was in the paper. We didn't invite any competition. We advertised for competitors.

Q. What paper did you advertise in?

A. That was looked after by the architect we had employed, and really I just don't call to mind what the name of the paper was.

Q. Who was the architect?

A. F. W. Redlick of Stillwater.

Q. Well, you were interested in securing the lowest bid you could, weren't you, on the building?

A. Yes, sir.

Q. Do you remember when it was that contract was advertised, that letting was advertised?

A. Not the exact date, no, sir, I don't.

Q. I believe you stated you were not a member of the [fol. 227] board at the time either the original building or the addition was built?

A. No, sir, I went on the board in 1924?

Q. In 1924?

A. Yes, sir.

Q. Do you remember the dimensions of the old building and the addition?

A. No, I don't think I ever did know that. I don't know what the dimensions were.

Q. I believe you said you didn't know the dimensions of the new building?

A. Well, really I don't.

Q. I hand you Plaintiff's Exhibit 8 and ask you to state whether or not you ever saw that before?

A. Well, I heard this read but that is the first time I ever had the instrument in my hand but I heard it read at the school meeting.

Q. That meeting was sometime in March, was it, 1926?

A. The last Tuesday in March, I believe.

Q. Now, at that time you heard read the paragraph of this letter which says: "We have no desire to be unfair in this matter, and we do not like to have it stand open indefinitely; but if you will advise us prior to April 1, 1926, that this offer of settlement will be satisfactory, then we will immediately submit proofs to the interested companies, in the amount as set forth herein."

A. Yes, I heard the letter read.

Q. And you remember that part of it?

A. Yes, sir, I heard it read.

Redirect examination.

By Mr. Anderson:

Q. Was Mr. Cableman [Kebelman] one of the bidders on the construction of the new building?

A. No, sir.

Q. He didn't bid then?

A. No, sir.

Q. You were asked by counsel relative to having obtained figures from the county superintendent and county treasurer as to what this building had cost the school district?

A. Yes, sir.

Q. You did that, did you?

A. Yes.

[fol. 228] Q. You had obtained information there prior to the time these adjusters met with you?

A. I believe we did.

Q. Do you recall what that information you obtained and showed that this building had cost the district?

A. Yes, sir, if I remember——

Q. Tell me first, do you know?

A. Yes, I remember——

Q. How much was it?

Mr. Lee: Object to that as incompetent, irrelevant and immaterial, hearsay and not the best evidence, not binding upon the defendants or either of them.

By the Court: Overruled.

Mr. Lee: Exception.

A. $93,000.

By Mr. Anderson:

Q. $93,000?

A. Yes, sir.

By the Court:

Q. Did you advise Mr. Fuller or Mr. Cableman [Kebelman]?

A. Yes, sir, we talked about that and I just made the remark the range was too wide.

By the Court:

Q. What did you say to Mr. Fuller about that?

A. I just said, "Mr. Fuller, the actual cost of this property was $93,000, according to the statement from the county treasurer" and then we talked about what it was insured for, and it looked to the board as though the difference between $93,000 and what we had it insured for would be a reasonable depreciation. That was our judgment.

Recross-examination.

By Mr. Lee:

Q. You say you learned from the county treasurer and county superintendent?

A. Yes, sir.

Q. The original cost of this building?

A. Yes, sir.

Q. Which part of the building was that?

A. All of it, both parts.

Q. All of it?

A. All together.

Q. And the county superintendent and the county treas-

[fol. 229] urer informed you that the original cost of the

old part of the building plus the addition to the building amounted to $93,000?

A. Yes, sir.

Q. Did that include furniture and fixtures?

A. That included furniture and fixtures.

Q. And included the building and everything?

A. Yes, sir.

Q. Were you there in the neighborhood when this addition was built, when the new building was built?

A. I lived there in the neighborhood, yes, sir.

Q. You lived in that district, did you?

A. Yes, sir.

Q. And you knew about the building of the addition?

A. Yes, sir.

Q. Now, this cost which the county superintendent and the county treasurer gave you, I believe you said covered everything, building, furniture and fixtures?

A. Furniture and fixtures and building.

Q. And remodeling the old part of the building, whatever the thing had cost the school district, up to the time of the fire?

A. That was it.

Q. When was it you procured that information, do you know?

A. We got it at the same time we got the cost on the movable and stationary equipment for the building.

Q. Do you remember why it was you didn't submit the figures on the building at the same time then, to Mr. Fuller?

A. Yes; they didn't ask for that. They just asked for an estimate on the equipment.

Q. And do you remember what part of this $93,000 was the cost of the furniture and fixtures?

A. No, but we have that list. I don't remember the exact figures, no, sir.

(Witness excused.)

CHARLES G. MORRIS was thereupon called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

[fol. 230] Direct examination.

By Mr. Flynn:

Q. State your name.
A. Charles G. Morris.
Q. Where do you live?
A. Oklahoma City.
Q. Where did you live during the year 1925?
A. Up until September 1st I lived at Yale, Oklahoma.
Q. What business are you engaged in at Yale?
A. In the insurance business and law.
Q. Did you represent the Concordia Insurance Company and the Braniff Company up there?
A. Yes, sir.
Q. Do you remember writing a policy or receiving an application for a policy of insurance on School District No. 98, that is, the Norfolk school building?
A. Yes, sir.
Q. Have you ever seen that building?
A. Frequently.
Q. Were you familiar with its construction?
A. Yes, sir.
Q. As agent for these companies up there, did you make an investigation of the buildings before they were insured?
A. I didn't go out and make an inspection, based definitely upon the application, being familiar with it, I knew or thought I knew approximately what it was worth and so advised the general agent at Oklahoma City.
Q. How much did you advise your general agent that building was worth?

Mr. Thurman: The defendants object as incompetent, irrelevant and immaterial and not tending to prove or disprove any issues in this case.

A. Approximately $100,000.
Q. Who was your general agent?
A. T. E. Braniff Company.
Q. What particular official company had charge of that?
A. E. E. Dogitt was in charge of agents out in the state.
Q. Did Mr. Dogitt make an inspection of this building also?
A. Yes, sir.

[fol. 231] Cross-examination.

By Mr. Thurman:

Q. How long have you lived at Yale?

A. About twelve years.

Q. And you say you moved to Oklahoma City about September 1, 1925?

A. Yes, sir.

Q. The local agents take applications for different amounts of insurance the owners of the porperty want insurance for, don't they?

A. Yes, sir.

Q. And you ordinarily write policies for the amount of insurance that the owner of the building wants on the building?

A. Well, I think that is based upon his information as to the value of the property.

Q. Yes, but that may fluctuate 25 per cent?

A. Possibly so.

Q. Without anybody taking any notice of it?

A. Possibly so.

Q. If I understand it, what you mean to say is that the agent, that is, the local agent or the state agent may object to the amount of insurance where it is palpably over-insured, which might have a tendency to result in a dishonest loss?

A. Yes.

Q. And that is when the state agent or the local agent reduces the amount of insurance below that applied for?

A. Yes.

Q. And that is the only instance in which it is done, isn't it?

A. I think so.

Q. Now, you stated, I believe, that E. E. Dogitt was state agent for some company?

A. For the T. E. Braniff Company, yes.

Q. You don't mean to say he was state agent for the Concordia fire Insurance Company?

A. I wouldn't say that, no.

Q. Have you seen any appointment of Mr. Dogitt as state agent for anyone?

A. No, I have not.

Q. All you know is what he may have told you?

A. What the T. E. Braniff Company wrote me was all I knew, coupled with what he told me.

[fol. 232] Q. What did the T. E. Braniff Company write?

A. They said their state agent, Mr. E. E. Dogitt would be in there; gave a certain date, I think.

Q. Let me ask you if, as a matter of fact, he isn't designated as state agent.

A. I think perhaps that is——

Q. For the agency, T. E. Braniff Company.

A. That is perhaps true.

Q. You don't pretend to tell the court and jury that E. E. Dogitt was a state agent or otherwise of the Concordia Fire Insurance Company?

A. No, for the T. E. Braniff Company.

Mr. Thurman: We now move to strike all of the witness' testimony with reference to E. E. Dogitt.

By the Court: Overruled.

Mr. Thurman: Exception.

By the Court: If he is a state agent and has the powers of a state agent, and was there as a representative of the T. E. Braniff Company, and the T. E. Braniff Company is the state agent for the Concordia, why Dogitt would perhaps have the power to represent them.

Mr. Thurman: I am simply relying upon the universal proposition that one agent without special authority cannot appoint another.

By the Court: Well, that is true, but power of an agent is sometimes determined by his acts, and if he represents a company in a certain capacity and that company accepts the benefits of his acts they perhaps would be bound by him as their representative.

Mr. Thurman: There is no evidence here any place that they ever accepted anything done by Mr. Dogitt.

By the Court: He did go out and inspect this building and he has approved this policy or the amount of it and then they accepted it.

Mr. Thurman: There is no evidence to that effect.

The Court: That is the testimony of this witness.

Mr. Thurman: He didn't testify Mr. Dogitt approved it. He said Mr. Dogitt didn't reject it.

By the Court: I understood him to say he examined it

[fol. 233] and made a report on it and Mr. Dogitt then came out and inspected it.

Mr. Thurman: That was his testimony, but he didn't say anything about any approval.

Mr. Anderson: The evidence shows they received our premium.

By the Court: I don't mean to say use the word approved but that is the impression that the court receives. Overruled.

Mr. Thurman: Exception.

By Mr. Thurman:

Q. Now, Mr. Morris, what is your business?

A. Lawyer.

Q. How long have you been engaged in that?

A. In Oklahoma City about three years and a half.

Q. Since coming to Oklahoma City you have been continuously engaged in the practice of law here?

A. Yes, sir.

Q. And you haven't had any business any place else since you came to Oklahoma City?

A. No, sir.

Q. And you came to Oklahoma City September 1, 1925?

A. Yes, sir.

Q. You know that these policies sued on in this case were not written until October 25, 1925, don't you?

A. I wouldn't be able to say that I knew because the record would have to show. I am informed that they were written.

Q. That is your understanding now?

A. Yes, sir.

Redirect examination.

By Mr. Flynn:

Q. You wrote the policy or took the application for the policy?

A. Yes.

Q. So you advised as to the construction of this building?

A. Yes.

Q. Did you notify anyone in connection with the Braniff Company?

A. I notified the T. E. Braniff Company.

Q. Do you remember how soon after the fire you were advised as to the building's destruction?

[fol. 234] A. I was not officially advised, only heard it in the course of gossip.

Q. You heard it and the- [then] notified the Braniff Company?

A. No, I don't recall whether I notified them. It seems to me I met Mr. Dogitt and discussed it with him on the street in Oklahoma City.

Q. Was that shortly after the fire?

A. The next day I believe or the day following.

By the Court:

Q. What is your custom among local insurance agents in a place the size of Yale for instance, where you write a policy of as much as $25,000, is that accepted without an inspection from the state office in some way?

A. I think not, your Honor. I have never heard of it being done and it is the practice always to inspect.

Mr. Lee: We object to that and ask that the answer be stricken as incompetent, irrelevant and immaterial, and a supposition of the witness.

By the Court: Well, it will be sustained.

By the Court:

Q. What has been your experience in writing policies of from $10,000 to $25,000 as to whether or not they are actually inspected by the State Agent before being accepted?

A. My experience is——

Mr. Lee: I beg the Court's pardon——

By the Court: What is the objection? Why would the defendants object to that question?

Mr. Lee: The objection is, first, that no custom or usage has been pled. Second, that the plaintiff's contention has been throughout that the local agents issued these policies and had authority to do so as such local agents of the respective defendants without any special authority from the defendant companies.

By the Court: I don't agree with you that that is the contention of anybody.

Mr. Lee: And the execution of the policies is not in issue in this cause in any sense of the word; for the further reason that an inspection, if there had been one, would be immaterial and irrelevant on any issue involved in this case.

By the Court: Overruled.

[fol. 235] Mr. Lee: Exception.

By the Court: You may answer the question. What is your experience?

A. My experience has been we have always insisted upon an inspection.

By the Court:

Q. Was there an inspection in this case?

A. Yes, sir.

Recross-examination.

By Mr. Thurman:

Q. When did Mr. Dogitt inspect this property?

A. I would say about the middle of September or the middle of August. I am only guessing at that because I haven't the record before me.

Q. When did you take an application for the policy?

A. I would be unable to answer that definitely.

Q. Did you take a written application for the policy?

A. Yes, sir.

Q. What was done with it?

A. Sent to T. E. Braniff Company, Oklahoma City.

Q. Was that done by you before you executed the policy?

A. Yes, sir.

Q. Was it before or after you took the application for the policy that you say E. E. Dogitt inspected the property?

A. It was after I took the application.

Q. Can you state about how long after?

A. I would say it was perhaps a week.

Q. You think that about a week after you took the application that Mr. Dogitt inspected the property?

A. Yes, to the best of my recollection.

Q. Were you with him at the time of the inspection?

A. No, sir.

Q. How do you know he inspected it?
A. Only by hearsay.

Mr. Thurman: Move to strike all of the witness' testimony with reference to the inspection of the property by Mr. Dogitt.

By the Court:

Q. Did Mr. Dogitt tell you he inspected it?
A. Yes, your Honor.

[fol. 236] Mr. Thurman: I object to that for the reason any statements or admissions of an agent are not admissible in evidence against the principal.

By the Court: Objection overruled.

Mr. Thurman: Exception.

By the Court: If the general agent can't state to a local agent he has done the thing he has been authorized to do I don't understand the rule of law. Somebody represents the insurance companies.

By the Court: That is quite true. This school board down here can't deal with the president up in New York.

Mr. Thurman: Exactly, and when in a case it becomes necessary to prove the acts done they can call in the man who did it or anybody who knew of him doing it or seeing him do it, but they can't call in somebody and get them to testify that he stated that he did it.

By the Court: The court disagrees with you on that.

Mr. Thurman: All right, your Honor will allow us an exception.

By the Court: Exception allowed.

(Witness excused.)

P. E. Perswell was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name?
A. P. E. Perswell.

Q. Where do you live?

A. Norfolk, Oklahoma.

Q. That is in School District No. 98?

A. School District 98, Payne County.

Q. What position, if any, did you hold with that school district?

A. Principal of the school.

Q. How long have you been principal of that school?

A. This is my fourth year.

Q. Were you there in January, 1926?

[fol. 237] A. Yes, sir.

Q. Do you recall the burning of the school building?

A. Yes, sir.

Q. Do you know where the fire originated in that building?

A. The first we saw it was in the southwest room upstairs.

Q. Was there a picture machine located in the building?

A. Yes, sir.

Q. Where was it located with reference to where the fire started?

A. At the extreme north end and upstairs in the building that was built out over the portico that went in from the door.

Q. Do you know whether or not the fire did start where the picture machine was located?

A. It did not.

Q. This fire, I believe, was early in the morning?

A. Somewhere between four and five o'clock.

Q. Who discovered it first, if you know?

A. My wife saw the reflection on the window and called me.

Q. Were you the first one in the school building?

A. Yes, sir.

Q. Now, Mr. Perswell, how long have you been engaged in the business of teaching school?

A. I have taught twenty-three terms.

Q. How long have you been acting as superintendent?

A. About fifteen years.

Q. What experience, if any, have you had in buying movable furniture and equipment for the school building?

A. Well, it is customary for the school boards to usually consult with the teacher, the head of the school and they

go to buy equipment and as superintendent at Oilton I advised with the board on buying the equipment for four school buildings, and the amounts were not to exceed $300, which was required to be advertised by law by them, but they authorized the superintendent just to make the small purchases directly from the company.

Q. If it was more than $300?

A. Then it had to be advertised and let by bids.

Q. Where they had to be advertised did you, as superintendent, supervise the purchases?

A. I always sat in with the board.

[fol. 238] Q. Did you know what the movable furniture and equipment in that building was worth at the time it was destroyed by fire?

A. Yes, sir.

Q. Do you know what the permanent fixtures in the building were worth at the time it was destroyed by fire?

A. Yes, sir.

Q. Do you know of your own personal knowledge what the permanent fixtures were in that building when it was destroyed?

A. Yes, sir.

Q. And do you know of your own personal knowledge what the movable furniture and fixtures were that were located in that building when it was destroyed by fire?

A. Yes, sir.

Q. Can you tell this jury approximately what the movable furniture and fixtures in that building were worth at the time they were destroyed as a whole?

A. Yes, sir.

Q. How much?

A. The movable furniture and fixtures were approximately above $6,000.

Q. A little above $6,000 you say?

A. Yes, sir.

Q. Can you tell this jury about what the permanent fixtures in that building were worth when they were destroyed?

A. Yes, sir.

Q. How much were they worth?

A. Over $2900.

Q. You were present were you?

By the Court: Permanent fixtures did you say?

Mr. Anderson: Yes, sir.

Q. Did you mean by that the ones attached to the building?

Mr. Anderson: Yes, sir.

By the Court: And would be considered a part of the building?

Mr. Anderson: Yes, sir.

By Mr. Anderson:

Q. Were you present at the time the others have testified about that the adjusters were there and discussed the matter with the school board?

A. Yes, sir.

[fol. 239] Q. Did you participate in that meeting?

A. I talked some with Mr. Fuller.

Q. When was that meeting held?

A. February 27, 1926.

Q. When you said Mr. Fuller, you meant Mr. Fuller that sits at the counsel table?

A. Mr. Guy Fuller, the man right there.

Q. February 27, 1926, it was held?

A. Yes, sir.

Q. It was held in your home or the one you occupied?

A. Yes, sir.

Q. Who was present at that meeting?

A. Three members of the board, Mr. Fuller, Mr. Kline, Mr. Mullens, myself, my wife was there most of the time, and Mr. Montgomery was there a part of the time.

Q. Tell the jury what occurred at that meeting and what was said and who said it.

Mr. Lee: We object to that as incompetent, irrelevant and immaterial and hearsay and not binding upon the defendants or any of them and an attempt to vary the terms of the written contracts by parole evidence.

By the Court: Overruled.

Mr. Lee: Exception.

Mr. Anderson: Go ahead.

A. They came into the room and they introduced one or two men, introduced me and we talked about the weather and a few things and finally sat down at the table and Mr. Fuller was on the west end——

Q. In the interest of time will you be as brief as you can. You do not need to go into minute details as to where they sat or anything of that kind.

By the Court: State what was said.

A. Mr. Fuller said, "Let's get busy" and produced some papers and began figuring and talked together and Mr. Fuller asked Mr. Cableman [Kebelman] if he had his figures ready to submit and Mr. Cableman [Kebelman] produced a paper with some figures on it and said that he did, and Mr. Fuller and Mr. Kline and Mr. Mullens kind of stooped their heads down together and discussed it a little while.

Q. That was the three adjusters?

A. Yes, sir.

[fol. 240] Q. Go ahead.

A. And Mr. Fuller had some sort of a form, it looked like, a printed form in which he took a lead pencil and wrote in some figures and then he said to Mr. Cableman [Kebelman], "This building can be replaced for this." Mr. Cableman [Kebelman] said that it could, and then Mr. Fuller handed the paper to me. I was sitting close to him.

By Mr. Anderson:

Q. Before he handed it to you, do you know whether or not he signed that?

A. There was, Guy Fuller's name was signed over at one side in lead pencil, and there was some blank lines on the other side and I presume for someone else to sign.

Q. You say he handed it to you?

A. Yes, sir.

Q. Go ahead.

A. I looked at it and I think I spoke up first. I said, "Mr. Fuller, have you anything on the fixtures?" And he said, "These are the top figures, take the building," and then Mr. Fuller and I had some discussion about the furniture that was in the building, and I took a pencil and

figured out the fixtures that were in the building. Mr. Fuller and I also had a discussion as to whether or not the stove and the four domestic science tables that were used with the gas pipe, half inch gas pipe fastened on them, whether they would go in as movable or whether they were permanent fixtures, and I thought maybe they would be movable, and he said, "Well, could you take them out without a wrench?" I said, "No, you would have to break a two inch pipe." He said, "Well, they would be attached," and I gave him a list of the seats, and Mr. Fuller said, "Well, there is no question about the movable furniture that you didn't have enough insurance on that," but that they could only pay the amount for which it was insured which was $3400.

Q. Go ahead.

A. And then I handed the paper to Mr. Quigley, I believe, and Mr. Quigley held the paper and looked at it and Mr. Edge I think looked over his shoulder. Mr. Langston glanced at it like, looked over by him and there was some little discussion that they had been informed by the people that lived in the district, and from the county superintendent, that the building cost more money than that. Mr. Quigley made the remark that the building had cost close to $90,000, and that it was only insured for $70,000 and that that $20,000 would surely take care of the depreciation, and Mr. Fuller in substance remarked that they could [fol. 241] replace it exactly as it was for that $55,000 and some odd, I believe it was $800, total building and equipment.

Q. With reference to the figures he put on the table, and that total, did he say anything to you and the board as to whether or not they would pay that sum?

Mr. Lee: Object to that as incompetent, irrelevant and immaterial, suggestive and leading and hearsay and an attempt to vary the terms of the written contract by parole evidence, and not binding upon any of the defendants.

By the Court: It will be sustained on the ground it is leading.

Mr. Anderson: It may be leading. It is not subject to the other objection.

By Mr. Anderson:

Q. Go ahead and tell what else occurred.

Mr. Lee: Object to that as being incompetent, irrelevant and immaterial and hearsay and an attempt to vary the terms of written contracts by parole evidence, not binding upon the defendants or either of them.

By the Court: Overruled.

Mr. Lee: Exception.

Q. Mr. Fuller remarked that they could build that, and that they had a contractor I think that was willing to contract to build it for that amount of money, and some member of the board asked him if he knew that Mr. Cableman [Kebelman] was a competent contractor, and Mr. Fuller replied that "If I didn't I wouldn't have brought him along to figure on this building." And then some of them suggested that the insurance companies just contract with Mr. Cableman and that would satisfy the board, and Mr. Fuller said, "No, you contract with him for the $55,800, and he will build it back just like it was, and he will give you a bond and then we will pay you that much." The board wanted to discuss these things by themselves, and the three members of the board went out on the front porch and stayed a little while and came back in and Mr. Quigley did the talking for the board when they came in, and he asked Mr. Fuller if that was all they would give, and Mr. Fuller said that it was, and Mr. Quigley said that he was authorized to state that the board didn't feel like accepting $55,800, and Mr. Fuller said well that was all they could get [fol. 242] and Mr. Quigley made some remark well he was sorry but it looked like a law suit, and Mr. Fuller advised him they better get some good ones.

Q. Some good lawyers?

A. Yes, sir, good lawyers.

Q. Some good lawyers?

A. Yes, sir.

Mr. Lee: We move to strike out the testimony of the witness and the answer of the witness on the ground the same is incompetent, irrelevant and immaterial and hearsay, and not binding upon the defendants or either of them, and is

intended to vary the terms of a written contract by parole evidence.

By the Court: It will be sustained on the ground it is immaterial what Mr. Fuller thought about the kind of lawyers you ought to have.

Mr. Lee: I refer to the long answer of the witness detailing what he says took place and what was said there, at this conference.

By the Court: Overruled as to all except what he says Mr. Fuller said about employing lawyers.

Mr. Lee: Exception.

By Mr. Anderson:

Q. Was there anything else said there?

A. Yes, sir.

Mr. Lee: We renew our objection to what was said there for the reason it is incompetent, irrelevant and immaterial.

By the Court: Overruled.

Mr. Lee: And not binding upon any of the defendants and an attempt to vary the terms of a written contract by parole evidence.

By the Court: Overruled.

Mr. Lee: Exception.

A. Mr. Fuller said, about the last words, they had never rebuilt a building, they had been in the business about thirty years and never would, and he began gathering up his papers and put them in his filing case, and the other people began to get up and the board walked on out and went on out of the yard.

Q. That ended the meeting?

A. That ended the meeting.

[fol. 243] Q. I show you Plaintiff's Exhibit 8, and ask you if you ever saw it before?

A. I heard it read at the annual school meeting.

Q. At what annual school meeting?

A. The meeting of last Tuesday in March, 1926.

Q. That was in March after the building burned in January?

A. Yes, sir.

Q. Now, Mr.Perswell, will you tell the jury as briefly as you can about what movable furniture and equipment was in the school building at the time it was destroyed by fire?

A. Well, there were maps and globes, a library table, three Singer sewing machines, three typewriter tables, three Underwood typewriters, and I think we had a Hoover kitchen cabinet, two metal file cabinets, two sets of bookcases, I think they were Globe-Warnecke, or Weeks, I couldn't say which, a Brunswick phonograph, and science equipment for general science, including a microscope and thermometer and things required by the state board, and chemical equipment, a chemical table, fire extinguishers, and athletic goods in the way of basket balls, volley balls and foot balls and suits, and $1,200 worth of band instruments; 250 folding chairs and 49 table arm chairs; planitarium, step ladder, and $54 worth of pictures, 8 waste paper baskets, 8 flags and 1 large flag for the auditorium, and a 6-B power picture machine; 12 Bentwood chairs, and 32 kindergarten chairs; 8 teachers' chairs, and a flat top desk for the office and 4 office chairs; 5 dozen scissors, and 12 dozen erasers, and the books in the library. We had an exceptionally good library. They were worth at least a thousand dollars, including dictionary and encyclopedias and all the books that are required by the state department for reference work for accredited high schools.

Q. Did you teach a high school course in the school?

A. We have a four year accredited high school.

Q. Did you have also a kindergarten?

A. We had what we call the beginning——

Q. You had practically the entire course up to and including the high school?

A. Yes, sir.

Q. Is that the reason you had all of that equipment in that school?

A. Yes, sir, in order to keep your credits for a high school they require a certain standard for equipment for all schools, whether they are rural or city, and of course, [fol. 244] being a high school we had to have the same type of equipment that the city schools have. We had books ordered from the McMillian Company, and Colliers and others that had just been delivered, and that we had not yet catalogued to the extent of $220, and they were burned.

Q. Does that about complete the list?

A. That about completes the list of movable equipment.

Q. Did you have any other musical instruments besides the band instruments?

A. Yes, sir, there was a piano there. I don't recall the name of the piano.

Q. About what was it worth?

A. Approximately $300, I would say.

Cross-examination.

By Mr. Lee:

Q. Are you also an attorney?

A. I was admitted to the Bar in 1914.

Q. Now, you say the fire started in the southwest room upstairs?

A. Yes, sir.

Q. What caused the fire?

A. I do not know.

Q. What was there in that room?

A. It was a class room.

Q. Just an ordinary class room?

A. Yes, sir, furniture and the cabinet, with some library books, blackboard and chairs and two electric lights and two big electric lights, and the two radiators, gas and steam radiators.

Q. You spoke about being superintendent at Oilton. When was that?

A. From 1917 until 1920,—'16 until '20.

Q. You say that the total of this movable furniture was how much?

A. Better than $6000.

Q. Have you the exact amount?

A. I have the exact amount that I say it was worth, $6,117.

Q. And the permanent fixtures how much?

A. 2926.00.

Q. Now, Mr. Perswell, do you know how the matter of the financial district, the purchase of this furniture and the building of this building was handled?

A. The building that was destroyed by fire?

[fol. 245] Mr. Anderson: Objected to as incompetent, irrelevant and immaterial as to how it was financed.

By the Court: I don't understand your question, Mr. Lee.

By Mr. Lee:

Q. What, if you know, did the county superintendent and the county treasurer have to do with the finances of this district?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Overruled.

Mr. Anderson: Exception.

A. The county treasurer is the custodian of the funds of all districts that are not what we term independent school districts.

Q. Was this an independent school district?

A. It was not.

Q. Did you ever see the records of this school district in the county treasurer's office?

A. Not all of them.

Q. What part of them did you see?

A. I saw some of the warrants—cancelled warrants that had been paid for material, the building of those buildings.

Q. When was that?

A. I could not give the exact date.

Q. Well, with reference to this fire, before or after.

A. The warrants was after the fire.

Q. And were these warrants that you saw, were they warrants issued before or after the fire?

A. Before the fire.

Q. And you saw them after the fire?

A. Yes, sir.

Q. Now, did you go through all of the warrants?

A. No, sir, I couldn't say that I did.

Q. Did you go through all the warrants for the years including the year the original building was built and the succeeding years?

A. No, sir, I didn't go through the warrants. I saw a copy of them from the county superintendent's office that was made up in his list. The law requires the clerk of the school board to file an annual report with the county superintendent showing every warrant, the number and amount,

[fol. 246] to whom it is written, and the county superintendent compiles a list of those warrants for the board, and I saw that copy.

Q. That it what you saw?

A. I saw some of the warrants since then in the county treasurer's hands.

Q. All right. This list which the county superintendent furnished the board here is not a list which the law requires him to furnish the board, is it? He does that for the accommodation of the board, does he not?

Mr. Anderson: I object to that as incompetent. He asked him as a matter of law if they didn't require that.

The Court: Objection sustained. It is a matter of law. It has been several years since he practiced and he would not be expected to know. It doesn't take a lawyer long to forget what he knows.

Mr. Lee: One reason I asked the question that way, he stated so frequently what the law requires, in his testimony, I thought I might be permitted to ask him.

The Court: There are certain forms which school boards are required to make and furnish to the county treasurer and the county superintendent. Those are matters of common knowledge as much as law. As to whether or not the county superintendent would be required to furnish a list, I don't know.

By Mr. Lee:

Q. Well, this copy of the record or part of the record in the county superintendent's office giving a list of warrants, which you say was furnished by the county superintendent to the school board, was furnished by him upon the request of the school board.

A. I think so.

Q. When?

A. I couldn't give the exact date.

Q. Was it before or after the fire?

A. I think it was after the fire. I am sure it was after the fire.

Q. And have you that list?

A. I do not.

Q. Do you know to whom it was sent by the county superintendent, who received it?

A. No, sir; I think, though, it was sent to the clerk; that is just an off hand guess.

Q. And somebody told you that was the list from the county superintendent, is that it?

[fol. 247] A. No, sir. I saw the list and it was certified to by the deputy county superintendent and signed by T. R. Copley, County Superintendent.

Q. So far as you know that list has not been destroyed, had it?

A. I don't know what became of it.

Q. And that list, you say, was in the hands of the clerk of the board?

A. I think it was.

Q. Well, will you tell the jury what member of the school board, what officer keeps the record of the school board?

A. The clerk of the school board.

Q. Your recollection is you saw it in his possession?

A. Yes, sir.

Mr. Lee: We now move to strike out the testimony of this witness that refers to the contents of the alleged certified list received by the school board or the clerk of the school board from the county superintendent, for the reason that his testimony is incompetent, irrelevant and immaterial and is hearsay and not the best evidence.

Mr. Anderson: He brought it out himself. We don't care whether it is in or not.

By the Court: Yes, that is in answer to your question.

Mr. Lee: It was brought out on direct examination.

Mr. Anderson: Oh, no.

Mr. Lee: May I ask another question before the Court rules on the motion?

By the Court: Yes, sir.

By Mr. Lee:

Q. Mr. Perswell, where did you get the list of movable and permanent fixtures which you have?

A. Why, part of it I wrote down from memory that day, some of it I went to Jasper Sipes' records and looked at and got them to give me some lists of the invoices.

Q. Where did you get your prices that you set down there for each of those items?

A. Most of them were on the invoices and I figured a depreciation that I thought they were actually worth at that time.

Q. In other words, your figures there are of prices based upon some invoices?

[fol. 248] A. The invoices are all higher than the prices that I figured.

Q. I understand, but the pages of your figures are invoices which you saw in the Jasper Sipes' Company's office or some other company's office?

A. Not every one of them.

Q. Well, a large part of them?

A. A large part of them.

Q. And you took off from that then the depreciation which you figured should be taken off?

A. Yes, sir.

Q. Did you take any of those cost prices from the list furnished by the county superintendent?

A. No, sir.

Q. You did not?

A. Not that I recall. I have every one of them. One set of maps from the Shepard Company, $152.00 had been bought about a month previous to that.

Q. And you took those cost prices from the county superintendent's office?

A. As near as I can recall within my knowledge. I knew it was $152.00.

Q. Is that the only one?

A. The only one I can see, yes, sir.

Q. What ones did you take from the invoice or records of Jasper Sipes Company?

A. 176 seats.

Q. Was that all?

A. That is all.

Q. Where did you get your cost prices of the rest of the furniture and fixtures?

A. Well, I knew what the cost of some of them were from having seen the old records before they were burned.

Q. Then your figures on those, that is as to the cost price, before you put in the depreciation price, was taken from the old records?

A. And my knowledge of what tables and desks and things of that kind cost.

Q. And where did you get the cost price on the rest of it besides what you took from the county superintendent's list and the Jasper Sipes Company and the old records?

A. The books that were burned, let me say, were not [fol. 249] paid for. I got them from the bills that we had to pay the book companies after the fire.

Mr. Lee: Now, we ask that the testimony of the witness as to all the items of furniture, the value thereof as to the items of books which he says were not paid for and he knew himself the cost price of them, be stricken as incompetent, irrelevant and immaterial and hearsay and based upon other records and not the best evidence.

By the Court: Overruled.

Mr. Lee: Exception.

By Mr. Lee:

Q. Now, you say you were present at this meeting which was held on February 27, 1926?

A. Yes, sir.

Q. That was in your home?

A. In the house I occupied.

Q. Well, did you have another home?

A. I had a home at Oilton. That is, I had property there if that is what you mean.

Q. But this is where you lived?

A. Yes, sir.

Q. Now, you say the members of the board were there?

A. Yes, sir.

Q. Your wife was there most of the time?

A. Yes, sir.

Q. Mr. Montgomery was there most of the time?

A. Yes, sir.

Q. Who was he?

A. I have since learned he was a contractor at Cushing.

Q. Do you know how he happened to be there?

A. I do not.

Q. Now, Mr. Fuller, Mr. Kline and Mr. Mullens were there?

A. Yes, sir.

Q. And Mr. Cableman [Kebelman]?

A. Yes, sir.

Q. Were you there at your house when these different parties came there that day? Were you there when the first ones arrived?

A. Yes, sir, I lived there at the house.

Q. What I mean is, were you at your house?

[fol. 250] A. Yes, sir.

Q. And did you remain there throughout the meeting?

A. Yes, sir.

Q. You were there then during all of the time of this conference, all of the time anything was said between Mr. Kline, Mr. Fuller and Mr. Mullens on the one hand and yourself and members of the school board on the other?

A. Yes, sir.

Q. Now, had you been in conference with the school board with reference to this loss prior to this meeting?

A. Oh, we had discussed it. Everybody in the school district, in that neighborhood around the surrounding country had talked about it.

Q. And you had a meeting of the school board after the fire and prior to this conference?

A. Yes, sir.

Q. Had you had more than one meeting?

A. I think we had two meetings.

Q. And was the matter of this loss discussed at those meetings?

A. Well, I couldn't say, but I expect it was because it was the principal topic of discussion in that section of the country at that time.

Q. And up to the time of this meeting what had been done by the board with reference to getting figures or submitting figures upon the building?

A. That I do not know.

Q. Did you hear that matter discussed at the board meeting and prior to this conference?

A. I couldn't say, but I think Mr. Langston remarked at one meeting that he had located a Mr. Ward Fisher who had been the architect on the addition, I would not be positive about it, whether it was at a meeting or at some other time I talked to him.

Q. At that time you knew where Mr. Autry was, didn't you?

A. No, sir.

Q. You didn't?

A. No, sir. I never met Mr. Autry until he was here. I never saw him or talked to him and didn't know where he lived until he told me Monday.

Q. He had left that district when you became superintendent, had he?

A. Some years before that.

[fol. 251] Q. When you became superintendent this new addition that was on there had already been built?

A. Yes, sir.

Q. Do you know approximately how long before you went there?

A. About two years.

Q. Now, do you remember what the height of that building was?

Q. You mean in feet?

A. Oh, no. It was a two story building is all I know, with a basement under it.

Q. Do you know any of the dimensions of it at all, the height, width or length?

A. I know the width of the building was 56 feet.

Q. Outside measurements?

A. Yes, sir, that was the old building.

Q. Do you remember the length of it?

A. No, sir, I do not.

Q. How large was the basement?

A. The basement—there were two rooms in the basement. I would say they were about 12 by 12 or 12 x 14.

Q. How was the building heated?

A. With gasteam radiators.

Q. Now, at this conference which was held there on the 27th day of February, 1926, what figures, if any, were submitted by the board to Mr. Fuller, Mr. Kline and Mr. Mullens or any them at that meeting?

A. As I recall the board did not figure anything at that time only just talked orally I think, as to the price of the old building.

Q. Just talked about the price of the old building?

A. Orally, yes, sir.

Q. Did the board at that time or any other time, to your knowledge, submit to Mr. Fuller, Mr. Kline or Mr. Mullens or any of them figures which they claimed were the sound value of that building at the time of the fire?

A. Not to my knowledge.

Q. Now, you were there all of the time during this conference, weren't you?

A. Yes, sir.

Q. And you attended the board meetings, too, didn't you?

[fol. 252] A. Yes, sir.

Q. And was anything of that kind ever done, to your knowledge?

A. Not to my knowledge only as I told you that was mentioned, but I couldn't say whether it was in the meeting or out of the meeting, about these plans he had gotten from Ward Fisher.

Q. That was on the addition, wasn't it.

A. Yes, sir.

Q. Now, I would like to get your idea on the height of the ceilings in this building. Do you remember about how high the ceilings were upstairs and downstairs?

A. They were about 14 foot ceilings.

Q. Both upstairs and downstairs?

A. Yes, sir, except in the auditorium part. The basement floor of the addition was all auditorium, and it I would say had about 20 feet.

Q. About 20 feet?

A. Yes, sir. We used it for a combination auditorium and basket ball court

Q. Was there a difference in the height then in the two parts of the building?

A. Not the top floor. The addition on the auditorium, the old building, was built up about so high where the first floor started, about four or five or six feet, something like that. The new building started down at the ground level, the floor for the addition, and we made the top joist level all the way through.

Q. The second floor then was all on a level?

A. Yes, sir.

Q. But the ground floor, the new addition, as I understand you, the floor of which was some four or five, maybe six feet below the floor of the old building?

A. Yes, sir.

Q. Did that auditorium, as you speak of it, cover all of the first floor of the addition?

A. Yes, sir, that and the stage.

Q. Now, as you remember, Mr. Fuller's statement there at the conference, he said that Mr. Cableman's [Kebelman's] figures plus the figures on the furniture and fixtures, both movable and permanent, made a total of $55,800?

A. That is what I recall. That is what I remember.

Q. Mr. Fuller handed you those figures.

[fol. 253] A. Yes, sir.

Q. And you in turn handed them to Mr. Quigley?

A. Yes, sir.

Q. And who was the other member of the school board besides Langston?

A. Mr. Edge, Howard Edge?

Q. Mr. Edge and Mr. Langston saw the figures too, did they?

A. I presume they say the sheet of paper. It looked like they were looking at it.

Q. What kind of a sheet of paper was that?

A. Well, about eight and a half by fourteen. It was on a printed form, and some blank spaces through it.

Q. A single sheet of paper?

A. Yes, sir.

Q. Are you sure it had printing on it?

A. I think it did. That is my best judgment.

Q. I hand you this sheet of paper and ask you whether or not that is the sheet of paper you saw at that time?

A. I don't think it was. I don't believe I ever say that before in my life.

(Thereupon, Court adjourned until 1:30 o'clock P. M. this day, at which time court reconvened, all parties being present as heretofore, the trial of the above entitled and numbered cause was resumed, and further procedings had therein as follows, to-wit:)

Proceedings, 1:30 o'clock P. M.

P. E. Perswell was thereupon recalled as a witness and, having been previously sworn, further testified as follows:

Cross-examination (continued).

By Mr. Lee:

Q. Mr. Perswell, the main part of that conversation at that conference on the 27th day of February, 1926, upon the side of the school board, was carried on by you, wasn't it?

A. No, sir.

Q. Now, when the conference ended you said the school board left?

A. Yes, sir.

[fol. 254] Q. The- [They] left ahead of Mr. Fuller and Mr. Kline and Mr. Mullens, did they not?

A. They left the ground ahead of them, yes, sir.

Q. They left the room ahead of them, too, didn't they?

A. I couldn't say. Possibly so. But I wouldn't be sure about that. They all practically left the room at the same time.

Q. Isn't it a fact that immediately after they came back from their conference outside, that is, the school board, and Mr. Quigley anonunced that he was authorized to tell Mr. Fuller that the board would not accept Mr. Fuller's figures, that one of the school board immediately left the building?

A. No, as I recall, Mr. Edge just came back and stood in the door.

Q. That is as far as he got back in?

A. Stood in the door.

Q. That is as far as he ever came back in from the conference with the school board outside?

A. Yes, sir.

Q. He stood there until Mr. Quigley said what he did say and then he left?

A. No. I think they left together, went out the front gate together, as I recall it.

Q. What was the last thing said by the school board or any member of it rather, before they left?

A. I think Mr. Quigley said the last words, that he was sorry that they would not either rebuild or pay the face of the policy because it looked like a law suit.

Q. Looked like a law suit?

A. I think those were the last words said, as I recall it.

Q. Now, do you know of the board considering of con-

ducting any further negotiations with the defendants or with Mr. Fuller, Mr. Kline, Mr. Mullen or either of them after that conference?

A. No, sir, only that letter that was read at the annual meeting.

Q. There was no reply to that letter was there?

A. Not that I know of. I couldn't say.

Q. Now did you have anything to do with the matter of salvage in the old building when it burned?

A. As to counting the bricks or things of that character, no, sir.

Q. You did not?

[fol. 255] A. No, sir.

Q. Do you know whether or not anyone else did on the part of the school board?

A. Only by hearsay. I saw them around there going to the different piles.

Q. Who were they?

A. Mr. Quigley and Mr. DeLong.

Q. Who was Mr. DeLong?

A. He was foreman for the Bailey-Burns Construction Company of the new building.

Q. How were these brick piled?

A. They were piled around in little piles. Certain numbers of them in different piles. They would wheel them out, the ones that were not cracked. The workmen would take them and take a hatchet and chop the cement off. When he got it chopped off he would pile the brick up.

Q. You had something to do with that counting?

A. Not the official counting of it, no, sir.

Q. What did you have to do, if anything, in loking after the school board's interest there when this salvage work was going on?

A. Well, they just told me to look around and kind of look after the interests of the district, and we had some trees planted out there and rose bushes and things, and to see they didn't run over or break down them or destroy any of those things.

Q. You had nothing to do then with saying what should be kept as salvage or what it should be figured at or anything of that kind?

A. Oh, no.

Q. And you had nothing to do with keeping track of the salvage material, did you?

A. No, sir, not especially keeping track of it.

Q. Now, about how much of the time was Mr. Quigley there if you remember, when that work was going on?

A. Well, he was there about two or three times a day.

Q. How long would he stay?

A. Sometimes ten minutes and sometimes two hours. There was one other thing, if I recall right, Mr. Redlick helped them check the brick.

Q. Who was he?

A. He was the architect on the new building.

Q. Architect on the new building?

[fol. 256] A. Yes, sir. I think he helped check the brick too.

Q. Was he there when this old building was being torn down?

A. Part of the time.

Q. How much of the time?

A. Well, I think he was there about two or three times.

Q. Do you remember how much time was spent in tearing down that old building?

A. No, sir.

Q. Do you remember how much time was spent in cleaning up and salvaging the old brick?

A. No, sir. When they finished tearing it down I went down to Ada and was down there for a while.

Q. You were not there then when they finished the work, tearing it down?

A. Not the tearing it down. I was back there when they finished excavating and cleaning it out after digging the ditch for the new wall.

Q. When was it you saw them count the brick?

A. Well, I would say it was along something like August or the first of September.

Q. I mean was it before you went to Ada or after you came back?

A. After I came back.

Q. Now, what happened while you were gone? You know nothing about it, of course?

A. No, sir.

Q. Do you know what became of that roof off of the old building?

A. That was gone long before I ever moved into the district.

Q. You don't know anything about that?

A. You mean the original building?

Q. Yes.

A. Oh, that was in there five years before I moved into the district, or two years before I moved into the district.

Q. I wish you would describe to the jury as best you can in your own words the manner in which this new addition was connected up with the old part of the building.

A. Of the original building?

Q. Yes. You have already described the difference in the elevation of the ground floor of the two buildings, now I wish you would describe as best you can how the walls were [fol. 257] joined and the arrangements there as best you can between the old part of the building and the new part.

By the Court: By the ground floor do you mean the basement floor?

Mr. Lee: No, I mean the first floor, what is commonly called the first floor of the building. He said, as I understand it, that the first floor of the old building sat something like four or five feet above the ground. The first floor or the corresponding floor of the new part of the building was set down on about a level with the ground.

By the Court: Does he mean the first floor or basement floor?

Mr. Lee: He means, as I understand it, the floor at or above the surface of the ground.

By the Court: That is what you meant, was it, Mr. Witness?

A. The basement for the toilets was under the original building at the north edge of the original building they had built on the addition and this first floor of the addition was some four or six feet lower than the floor above the toilets in the old original building.

By Mr. Lee:

Q. Now, I wish you would go ahead and describe in your own way how the connection was made between the two parts of the building, the new and the old part, including connect-on between them both as to the walls, floors, steps,

stairs and so forth. Give us a general description, please.

A. The walls just looked as though they had been built right as one wall, just built right on up as one wall. There was a stage that was elevated above this first floor of the addition, and the steps went down to the level of the stage, and then some steps down to the level of the floor from that, two little short steps put them down on the inside.

Q. If I understand you correctly, coming down out of the old building into the new one, you went down some steps on to a sort or landing?

A. Yes, sir.

Q. Or platform?

A. Yes, sir.

Q. And that also constituted the stage, did it?

A. That first level, yes, sir.

Q. After you went down some steps?

[fol. 258] A. Yes, sir.

Q. On to a landing there was a platform there and a stage?

A. Yes, sir.

Q. Then to get down onto the main auditorium floor you went down steps from the stage, of course?

A. Yes, sir.

Q. Or that platform?

A. Around the two sides of the addition there was a concrete floor running on each side the length of the building that was on a level with the stage. Then the floor was sunk two and a half or three feet lower, I judge something that way, it was a wooden floor above on the ground floor.

Q. Now, you stated that the walls apparently joined together as one wall. That is the walls of that old part of the building and the new part?

A. Yes, sir.

Q. Was there any part of the partition between the old building and the new part of the building and brick wall or was there any partition there at all?

A. There was on the west side, which came out, I would judge, something like about fifteen or twenty feet from the west while extending east where the stage started, and that was still a well [wall]. It was plastered. I couldn't say whether it was brick or not.

Q. Did you ever notice the thickness of that wall?

A. If I recall, the wall was seventeen inches thick.

Q. That is, I mean this particular one.

A. Yes, sir, the walls through there, Mr. Tinnee came up there one time and he and I went out and talked about the wall and measured several of the walls at that time.

By the Court: What is the purpose of this testimony?

Mr. Lee: Simply to get at as nearly as possible the construction of this building so that if we desire to propound hypothetical questions to people who have seen it, we may have the foundation to do so, and also to give the jury a general idea of the construction of the building.

By Mr. Lee:

Q. Now, you spoke about the floor of the new building, that is the auditorium part, the main floor being wood.

A. Yes, sir.

Q. What kind of flooring was that, do you know?

A. Well, I think it was about a two inch or two and a half [fol. 259] inch pine is what I would think, a narrow strip floor. It was not a four inch board.

Q. It was not oak or maple, was it?

A. No, sir.

Q. It was pine in your judgment?

A. Yes, sir.

Q. How about the floors in the other part of the building, that is, the second floor and the first floor in the old part of the building, what kind of floors were they?

A. Excepting in the front where you came in from the front of the building, I don't know whether you would call it a lobby or what you would call it out in front, that was a cement with tiling, little small checkered tile on it, colored. Then it was wainscoted up about four feet with some kind of tiling. Then the stairs were wooden stairs and the flooring in the primary room was a wooden floor or pine floor. I judge all the floors upstairs and the higher posts were pine floors.

Q. About what width was that flooring, if you can tell us?

A. Oh, something like three to three and a half inches.

Q. Did you ever notice the other finish of the building as to what kind of lumber it was?

A. Most of the finish, as I recall it, was oak. The two posts on the stairs that were torn out at the time they put in the original building are still there and they use them as

a step on the west end. They were cut for a stair on the west end out by a little gas house they had, and this was oak.

Q. What kind of construction was that before the fire?

A. One part of the step, the part that come up this way—

Q. You don't mean the part they stepped on when they went up?

A. Going up the steps, yes, sir.

Q. Or was it the supports?

A. No, sir, it was a step about eight inches wide and about four feet long.

Q. What did you mean a little bit ago when you said you thought the stairs were pine?

A. When they changed the stairway, as I understand the proposition, Mr. Hitt changed the stairway, took out the stairway and put in a new one to reach the second floor of the new addition.

Q. Then at the time of the fire, the stairway was all pine, was it?

A. Yes, sir, I think so.

[fol. 260] Q. Then if I understand you correctly, at the time of the fire the main floors and the stairway and the other woodwork, principally woodwork of the building, doors and so forth were pine?

A. On the addition; in the old part they were oak.

Q. The floor wasn't oak, was it?

A. No, not the floor but the window frames and door frames and window sills and things of that character.

Q. How about the doors?

A. Well, I think the doors were birch, but my off hand guess; birch doors is what I would think.

Q. Do you know what the frame work, that is, the heavy material, floor, joists and studding and that stuff were?

A. I do not. There were two toilets up stairs that had this same kind of flagging on, the same as the lobby out in front.

Q. How large were they?

A. I would judge they were about eight by fourteen, would be my off-hand guess.

Q. That is two of them?

A. No, sir; that was six of them, something near that.

Q. How large was this entrance way, this piece of floor-

ing, the main part of the flooring which you said was covered by tile?

A. I think it would be about sixteen feet wide, and the main part of it perhaps about fourteen feet, and then it went down the halls to the south, went down a little narrow hall to the south wall and then turned down the stairs to the boys' basement, and the other one went north and turned down to the girls' basement.

Q. How wide were these different strips that you say went down?

A. Oh, about a four foot hall, I would say, something like that.

Q. I handed you a paper a while ago and asked you whether or not that was the paper you saw at the conference there which you said Mr. Fuller handed you the figures on it, and upon which you said you thought his name was signed. I now hand you another paper and ask you to state whether or ont that appears to be like the the paper that you say Mr. Fuller handed to you during the conference.

A. No, sir; I don't think it is.

[fol. 261] Q. Do you know what any part of the printed matter on that paper he handed you was?

A. No, sir; I didn't read it.

Q. You didn't read it?

A. No, sir.

(Witness excused.)

Loyd J. Mullen was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. State your name.

A. Loyd J. Mullen.

Q. You live here in Oklahoma City?

A. Yes, sir.

Q. What is your business?

A. Adjusting.

Q. For insurance companies?
A. Yes, sir.
Q. Were you one of the adjusters that attempted to adjust the loss on School District 98 in Payne County?
A. Yes, sir.
Q. In January and February 1926?
A. Yes, sir.
Q. What company did you represent?
A. The Concordia Fire Insurance Company.
Q. As its adjuster?
A. Yes, sir.

Cross-examination.

By Mr. Thurman:

Q. What was your authority as adjuster for the Concordia Fire Insurance Company?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Anderson: Exception.

A. To investigate the circumstances surrounding a fire and tried to arrive at the sound value and loss and damage.
Q. Did you have any authority from the Concordia Fire [fol. 262] Insurance Company to either admit or deny any liability under its policies?
A. No, not from the Concordia.
Q. What was your duty as such adjuster for the Concordia Fire Insurance Company when you made your investigation?
A. You mean in the making of it or after——
Q. After you had made your investigation or attempted adjustment?
A. To attempt to arrive at the sound value of loss and damage to the building and——
Q. If you did that then what was your duty?
A. If the sound value in loss and damage was as we figured it, that is, if it was agreed upon by the assured as we call them, as we figured it, and no disagreement on it, then we would take the proof of loss and submit it.
Q. What would you do with the proof of loss?

A. Well, in my office if the proof of loss is proper the draft would be issued to cover the proof.

Q. Then what became of the proof of loss?

A. The proof of loss together with the advice of draft was then submitted and referred to the home office through the mail.

Q. In whose name was the draft signed?

A. T. E. Braniff Company.

Q. Did you have any authority to sign the name of the Concordia Fire Insurance Company?

A. No, sir.

Q. And the drafts were issued in the settlement of losses, were issued to the T. E. Braniff Company?

A. Yes, sir.

Q. In your office?

A. Yes, sir.

Q. Was that due to some arrangement between you and the T. E. Braniff Company or between you and the Concordia Fire Insurance Company?

A. Between me and the T. E. Braniff Company.

By the Court:

Q. Did you have authority to make a settlement of a loss for his company provided you could agree on the amount?

A. I would have authority from the T. E. Braniff Company.

Q. And settle the loss if you could agree on the amount? [fol. 263] A. Yes, sir.

By the Court:

Q. What is the relation between the T. E. Braniff Company and the Concordia Insurance Company?

Mr. Thurman: May I ask a preliminary question?

By the Court: If you know. Yes. Just a moment.

By Mr. Thurman:

Q. Did you ever have occasion to examine or see any power or authority given by the Concordia Fire Insurance Company to the T. E. Braniff Company?

A. No, sir.

Mr. Thurman: We now object to that, if the Court please, for the reason that the witness could not know except by hearsay as to the authority of the T. E. Braniff Company.

The Court: Yes, I think your objection would be good under the circumstances. However, the conduct of the parties is often as strong as an agreement itself. That is all.

Redirect examination.

By Mr. Anderson:

Q. You say the T. E. Braniff Company had authority to issue the draft in payment of that loss, or the check?

A. No, sir; I don't know what their authority was.

Q. I understood you a moment ago or else I misunderstood you that the T. E. Braniff Company would issue the draft or check in payment.

A. That would be issued in my office in the name of the T. E. Braniff Company which authority is conveyed by them to me.

Q. Then if the party agreed on a settlement of this loss the T. E. Braniff Company would have paid the loss in its name?

A. Presumably so, yes, sir.

Q. Now then you were connected with the T. E. Braniff Company?

A. No, sir.

Q. You had no connection with the T. E. Braniff Company?

A. No, sir; other than the business relationship, that is all.

Q. You maintained your office I believe, over there with it?

[fol. 264] A. No, sir.

Q. You didn't do that?

A. No, sir.

Q. Now you say you were the adjuster to adjust this loss in behalf of the Concordia Insurance Company?

A. Yes, sir.

Q. And your purpose in going out there was to agree with this school board if you could on a settlement so far as the Concordia was concerned, wasn't it?

A. In the final analyses; yes, sir.

Q. That is what you were there for, and you undertook to do that and failed to reach an agreement with them?
A. Yes, sir.

Recross-examination.

By Mr. Thurman:

Q. Did you ever make any proposition of settlement to this school district on behalf of the Concordia?
A. I don't recall that I ever made any proposition because Mr. Fuller was acting as spokesman for us, for the three of us there. We would have our conference and have our understanding, and he was leading in the negotiations.
Q. So that whatever was said to the school district concerning the loss or compensation for the loss was said by Mr. Fuller?
A. That is my recollection.

Redirect examination.

By Mr. Anderson:

Q. You say that Mr. Fuller was spokesman for the adjusters, that included you and Mr. Kline too?
A. That is my understanding of it, at least it included me.

(Witness excused.)

George W. Kline was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. State your name.
A. George W. Kline.
Q. You reside in Oklahoma City?
A. Yes, sir.
[fol. 265] Q. What is your business?
A. Claim adjuster.

Q. For who?

A. For the general agency at Dallas.

Q. For what company?

A. Well, they have about fourteen companies in the office.

Q. That is that you represent as adjuster?

A. Yes, sir.

Q. Were you one of the adjusters that met with the school board of School District No. 98 of Payne County in the latter part of February, 1926, in an effort to adjust the loss of the district by the burning of the school building?

A. Yes, sir.

Q. What company did you represent then?

A. The Fire Association of Philadelphia and the Royal Insurance Company.

Cross-examination.

By Mr. Lee:

Q. Mr. Kline, what was your authority in the representation of these two companies as such adjuster?

A. To arrive, if possible, with the assured on the sound value and loss and damage on the property involved if an agreement be reached between the assured and myself as to such sound value and loss, it was my duty to reduce that agreement to a proof of loss and submit it to the companies for approval.

Q. Did you have any authority from either of these companies to pay this claim?

A. No, sir.

Q. Did you have authority from either of these companies to draw a draft on them in payment of this claim?

A. No, sir.

Q. If I understand you correctly, your authority was limited to attempting to agree upon the amount of the sound value and loss and damage and if you did agree to take a proof of loss in writing and submit it to the company?

A. Yes, sir.

Q. Did you have authority to determine whether or not those companies were liable for those losses, that is, in the sense of construing the terms and conditions of the policy except in the matter of arriving at the sound value and amount of loss and damage and submitting that to the company?

[fol. 266] A. No, I wouldn't say that the determination of liability or lack of liability was left to me. I was authorized to get the facts that were available, and if there was any question as to the application of the insurance contract or any question of a violation or non violation of its conditions, I had to report those facts back to the company and let them determine which applied.

By the Court:

Q. What are the duties of an adjuster?

A. As outlined to me, I am instructed to arrive at the loss and damage on a loss if I am able to agree with the assured on such loss, and to reduce that to a proof of loss and submit it to them, and if they approve it they pay it.

By the Court: Is that proof of loss you speak of something prepared by you?

A. Usually, if the agreement is arrived at, yes.

Q. Assuming that you agree as an adjuster on the amount of the actual loss, then what do you do?

A. I beg your pardon, if the assured and I agree?

Q. Assuming that you and the assured agree on the amount of the actual loss, what do you do?

A. Draw up all the facts in connection with the loss in the proof of loss, and have the assured properly sign it and acknowledge it and forward it to the company.

Q. Do you recall why you didn't reach an agreement with the assured in this case?

A. Yes, sir.

Q. What was it?

A. In my opinion, the sound value of the building was something more than $50,000 and the assured showed no disposition to discuss it with us on that basis.

By the Court: In other words it was a question of value?

A. It was in my mind. Apparently not in theirs.

By Mr. Anderson:

Q. The only reason you didn't reach an agreement with the Board that day was the difference between your views as to the amount of loss, wasn't it?

A. Whose views?

Q. Yours and the board's.

A. As I remember it, yes, sir.

Q. Now, if you had reached an agreement with the board that day as to the extent of their loss, as far as your company is concerned, you would have made a report to them, wouldn't you, and at the time recommended the payment of that sum?

[fol. 267] A. I would have submitted it to them for signature and execution and proof of loss embodying the amount agreed upon.

Q. And you would have advised your company that you had agreed with this board on a certain amount they were to pay, wouldn't you?

A. Yes, sir.

Q. And then unless that was rejected by some higher authority, a draft would have been issued in payment, wouldn't it?

A. That is the usual procedure, yes, sir.

Q. This proof of loss you talk about taking, is that the proof of loss that the policy provides that the insured shall furnish?

A. I don't know.

Q. You don't know. There is nothing in this policy, is there, that provides that you will take the proof of loss?

A. No, I don't take the proof of loss.

Q. And under the terms of the policy the insured ordinarily furnishes you proof of loss before you attempt to reach an agreement with him. Isn't that right?

A. No, sir.

Q. That isn't right?

A. No, sir.

Q. You were not out there that day just to take a proof of loss but you were out there to try to settle the amount of this liability as far as this company was concerned, to reach an agreement with the board, weren't you?

A. I was out there in an attempt to reach an agreement but not to settle the liability.

Q. You were not out there asking the board to agree to something you were not going to agree to yourself; in other words you were out there representing your company to reach an agreement with this board as to the amount of their loss, weren't you?

A. Yes, sir.

Cross-examination.

By Mr. Lee:

Q. In cases where you do not agree with the assured the amount of the loss of damage he has suffered, do you prepare him a proof of loss?

A. No, sir.

Q. You said something about this proof of loss if you agreed on the amount of loss and damage being acknow-
[fol. 268] ledged. You mean by that that the assured would have to swear to it.

A. Yes, sir.

Q. Now, you were asked what took place with reference to a disagreement as to the value or amount of loss on this property of the school board. Did the school board or any of them state to you at that time or any other time what the value of this school building was at the time of the fire?

A. No, sir.

By the Court:

Q. Was there anything said that day by any member of the school board in your presence of what they thought the building was worth?

A. I don't recall that there was, no, sir.

Q. You are not positive about it?

A. Not positive about it, as far as I know, not.

Redirect examination.

By Mr. Anderson:

Q. Did you ask the school board to furnish you any information they could furnish you?

Mr. Lee: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion and opinion of the witness.

The Court: Overruled.

Mr. Lee: Exception.

A. Yes.

By Mr. Anderson:

Q. What was it?

A. When I met Mr. Langston with Mr. Fuller the first time, Mr. Fuller and I asked him whether he had plans and specifications for this building. He said he had not and he said most of his records had been destroyed in the fire; that he thought that either an architect in Alva or Woodward or a man named Fisher in Oklahoma City had some of that information; that possibly a contractor named Hitt in Yale had it. I told Mr. Langston that it would be proper for him to get this information if he could, and that we would exhaust our resources to get the information and have our own information and an estimate made of the cost of the reconstruction of the building, and that it would be proper for his information and for the board's information to have a similar estimate made which was so they might be satisfied as to the cost of the reconstruction.

Q. Who did Mr. Cableman [Kebelman] represent in making the estimate of the re-building, if you know?

[fol. 269] A. Mr. Fuller, Mr. Mullen and myself.

Q. He was retained by you adjusters in behalf of all the insurance companies to make that estimate. Is that right?

A. Yes, sir.

Q. And when you had this meeting with the board over there you told them what it would cost to rebuild it?

A. We didn't tell them. Mr. Cableman [Kebelman] did.

Q. You adopted his figures and told them, didn't you?

A. Yes, sir.

Q. You say this proof of loss you were going to take if you reached an agreement was this proof of loss that the policy provides shall be sworn to by the insured?

A. Yes, sir.

Q. And you don't take those proofs of loss unless you reach an agreement with the assured, is that right?

A. That is right.

Recross-examination.

By Mr. Lee:

Q. Now just what do you mean by saying you take the proof of loss where you agree with the assured?

A. The insurance policy provides that within a certain time the assured must file a sworn statement and sets out very clearly what items must be embodied in that. There

is nothing in the insurance policies that requires an insurance company to send an adjuster out there or to provide them with proof of loss upon which to make their claim. In the interest of uniformity and in the interst of expediting their business, the insurance companies do that and it is a courtesy shown the assured when they go there and use a form which they have prepared at their own expense for that purpose. When they have amicably arrived at that agreement, and there is no provision of law or in the policy that requires us to do it. It is a courtesy pure and simple.

Q. And that is what you meant you would do if you could agree with the assured upon the loss, you use your blank form and fill it in according as the assured says the facts are and put in the agreed amount of loss and damage at the proper places in the proof of loss?

A. Exactly.

Q. That is, the sound values and so forth. Is that right?

A. Yes, sir.

Q. Now, could you prepare for this school district a proof of loss as you described it provided for in that policy [fol. 270] unless you had agreed upon the amount of loss and damage?

A. No, sir.

By the Court:

Q. Do you furnish these proofs of loss unless they are requested?

A. Unless they are requested?

Q. Yes, unless the assured requests them do you send them out?

A. The proof of loss is a form that is used on which the assured always makes his claims whether it is done after an amicable agreement or whether he makes it up himself and files it on a form of his own.

Q. This form you speak of, this uniform form which you sent out to the assured, do you send that our [out] to the assured whenever you have a loss without his requesting it?

A. No, sir.

(Witness excused.)

GUY H. FULLER was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. State your name.
A. Guy H. Fuller.
Q. You live here in the city?
A. Oklahoma City, yes, sir.
Q. Who are you connected with?
A. I am manager of the Fuller Adjustment Company.
Q. Of this city?
A. Oklahoma City.
Q. Were you one of the adjusters that attempted to adjust this loss of School District 98, Payne County, on the loss of its building and equipment by fire on January 2, 1926?
A. I am.
Q. What company do you represent?
A. The National Fire Insurance Company of Hartford, Connecticutt [Connecticut].
Q. As its adjuster?
A. As its adjuster.

[fol. 271] Cross-examination.

By Mr. Lee:

Q. What was your authority as such adjuster representing the National Fire Insurance Company of Hartford, Connecticutt [Connecticut]?
A. To investigate the circumstances in connection with the fire and ascertain and agree, if possible, with the owner or assured as to the sound value of the property, and upon reaching such agreement to submit proof to the company for their consideration.
Q. Did you have any authority to pay that loss or agree to pay it?
A. No, sir.

Redirect examination.

By Mr. Anderson:

Q. You had authority to agree with them on the extent of that loss?

A. We had authority to agree with them as to the extent of the sound value of the property.

Q. And that represents their loss?

A. And loss and damage.

Q. And you report that to the company you represent and unless rejected by them it is paid accordingly?

A. We submit the proof in the regular course to the company for consideration, and if approved it would naturally be paid.

Q. And if they accept that proof then you issue a draft in payment of the loss?

A. That is the basis for the consideration of it.

Recross-examination.

By Mr. Lee:

Q. And if they don't accept the proof do they issue the draft then?

A. They do not.

Q. In other words, it is a question of whether or not that loss is paid being left up to the company?

A. Entirely to the company.

(Witness excused.)

V. I. Langston was thereupon recalled by the plaintiff and, having been previously sworn, further testified as follows:

[fol. 272] Redirect examination.

By Mr. Anderson:

Q. Your name is V. I. Langston?

A. Yes, sir.

Q. You were on the stand yesterday?

A. Yes, sir.

Q. You were clerk of the school board?

A. Yes, sir.

Q. Mr. Langston, did you file with these insurance companies a sworn proof of loss showing the loss of School District No. 98 on account of this fire?

A. I did not.

Q. Why didn't you?

Mr. Thurman: Object to that as incompetent, irrelevant and immaterial and calling for a conclusion.

By the Court: Overruled, if he knows.

Mr. Thurman: We also object on the ground that the purpose is to vary the terms of a written contract by parole evidence.

By the Court: Overruled.

Mr. Thurman: Exception.

A. The reason I didn't, on the first visit of Mr. Fuller, and Mr. Kline to my office on or about the eighth or tenth day after the fire, they came in and asked me if I had specifications and plans and inventories, an inventory of the equipment of the building that burned. I explained to them that my records had all burned. Then they asked me, Mr. Fuller asked me if I would furnish him an inventory of all the movable equipment and he would run the plans and specifications down. Then from that conversation I assumed that they had taken the situation in hand relative to our loss, and from that time on I followed their instructions.

Q. And did you furnish all they asked you to?

A. I furnished all I was asked to furnish.

Q. At the time you had this meeting with the adjusters in the latter part of February, 1926, did you know who had constructed the original building?

A. Yes, sir. That is, no direct information, but it was general knowledge as to who did that.

Q. Did you know where he was?

A. No, sir.

[fol. 273] Q. Were you asked anything about where he was by these adjusters?

A. I believe they asked me if I knew where he might be located, but I didn't know his location.

Recross-examination.

By Mr. Lee:

Q. Mr. Fuller and Mr. Kline both asked you and told you that you should furnish specifications and plans for these buildings, didn't they?

A. They asked me if I had the plans and I told them I did not.

Q. And they both told you that you should furnish them, didn't they?

A. No, sir.

Q. And pursuant to their instructions, you did furnish the plans and specifications on the new part of the building only, didn't you?

A. I thought you had reference to this first visit to the office about ten days after the fire. On that visit I explained to them if the plans and specifications were in the files they were burned. Then is when they told me to furnish them if possible from records I might have available and inventory of the movable equipment and they would run down the plans and specifications. They asked who constructed the original building and if I recall I gave them the name of Mr. Autry and told them I didn't know where he might be found, but when they left it was with the understanding they would run those plans and specifications down, and all I was to furnish at that time from instructions on that visit was the inventory of the movable equipment.

Q. About when was that?

A. About eight or ten days after the fire.

Q. About the eighth or twelvth [twelfth] of January, was it?

A. That is right.

Q. When was it you did get the plans and specifications on the new part of that building?

A. I believe that was after I had a request from Mr. Fuller to do all I could to get them, and was about January 20th. I believe their [there] is correspondence in the records here that will show that.

Q. Yet you say that Fuller and Kline were to get these plans and specifications?

A. They said they would do that, yes.

[fol. 274] Q. Did you ever furnish any plans and specifications for the old part of that building?

A. No, sir.

Q. Did you ever furnish any figures showing the sound value of the old part of that building?

A. I think at this meeting on February 27 someone gave the figure of approximately $90,000, in that neighborhood, as to the cost of that property.

Q. That is, as to the whole cost of the property?

A. The building and equipment.

Q. Building and equipment, and included the original cost of the old building and the cost of the new addition to it, the changes that were made in the old building and all of the equipment, didn't it?

A. That would be my understanding.

Q. Now, do you know anything about what the records show was the cost of the changing of that old building?

A. I don't know, no, sir.

Q. And you can't tell the jury what that cost, can you?

A. No, I can't tell, that is, for changing and getting the two buildings together?

Q. Yes, sir, and putting a new roof on, on the old building and all the changes made.

A. No, sir, I don't know what that item would run into.

Q. You don't know what the roof on the old building cost, do you?

A. No, sir.

Q. And therefore, you do not know what the value of the building was at the time of the fire, do you?

A. I wouldn't say I would know the sound value of it other than just reasonable depreciation, and my judgment on that wouldn't be considered perhaps sufficient.

Q. Well, you don't know really what a building like that would cost if it was built from the ground up, would you?

A. Well, I have an idea about what that one cost, that is what that one basing the amount of our insurance policies on when they were insured.

Q. But you don't know how much of that cost went into the remodeling of the old building, do you?

A. I don't know how those items would be separated, no, sir.

Q. Now, you say that Fuller and Kline were to get these specifications?

[fol. 275] A. Yes, sir, that is what they said they would do.

Q. If that was your understanding why did you concern yourself with the specifications after that?

A. Because after that visit Mr. Fuller wrote a letter and said he was having some trouble in getting them located, and asked me to assist all I could in getting them, so then it was when I communicated with Mr. Fisher and I got the specifications from him.

Q. Have you the letter?

A. The letter I received from Mr. Fuller?

Q. Yes.

A. It was read yesterday, I believe.

By the Court: It is in evidence.

By Mr. Lee:

Q. You say Mr. Fisher was the man who had the plans and specifications for that part of the building?

A. I wrote Mr. Fisher and asked him about it, and then he replied and sent me the specifications.

Q. Mr. Fisher was the architect on the new part of the building, wasn't he?

A. I believe he was. That is not direct information, but I am sure he was.

Q. That is the reason you wrote to him?

A. Yes. It was from my understanding of the situation I wrote to him.

Q. He is the same Mr. Fisher the school board has here as a witness in this case, is he?

A. I believe so.

Q. He is in the court room, isn't he, or has been?

A. I don't believe I see him now. I think he has been here, yes, sir.

(Witness excused.)

Mr. Anderson: On yesterday I had these plans identified as Plaintiff's Exhibits 9 to 13, I believe inclusive, but not actually introduced in evidence, and now I offer them in evidence.

Mr. Lee: To which the defendants object as incompetent, irrelevant and immaterial and as not having been properly identified, and hearsay and for the reason that they are

not intelligible without the specifications which should accompany them.

[fol. 276] By the Court: Overruled.

Mr. Lee: Exception.

Mr. Anderson: I now offer in evidence the specifications which were identified on yesterday as Plaintiff's Exhibit 14.

Mr. Lee: To which the defendants and each of them object for the reason that they have not been properly identified and are incompetent, irrelevant and immaterial and hearsay, and are not binding upon these defendants or either of them.

By the Court: If the Court recalls, the witness Hitt testified that he examined both plans and specifications and said he built the building and that he built it according to these plans and specifications, if I recall. Objection overruled.

Mr. Lee: Exception.

(Thereupon, the said plans, being maps, Exhibits No. 9 to 13 inclusive, were received in evidence and made a part hereof, and Exhibit 14, the specifications was received in evidence, and is as follows:)

PLAINTIFF'S EXHIBIT NUMBER FOURTEEN

Specification for Public School Building District #98, Norfolk, Yuyne [Payne] County, Oklahoma, Ward H. Fisher, Contracting Engineer, Oklahoma City

General Conditions

All bids shall be delivered sealed to the Clerk of the Board, on or before the time advertised.

Purpose

It is the purpose of this specification and the accompanying drawings to set forth the plans and details of an addition to the present building and of certain changes to be made in the present building itself. Said changes include the removal of the old roof and roof frame down to the second floor ceiling joists, a certain amount of the masonry walls necessary to prepare [prepare] them for the completion of the entire building, according to the accompanying drawings, certain parts of the floors, partitions and stairways.

All bidders on the contract for labor for any part or parts of this building are hereby notified and warned to visit the present building and study the dismantling work to be done. Inasmuch as it is impossible to show on the plans for the completed structure, all of the old material to be removed, bidders are urged to measure the old building personally [fol. 277] and contractors shall be held responsible for the carrying out of their work, in line with the actual dimensions of the old building. Dimensions of the old building shown on the plans and lack of dimensions as to story heights, etc., shall not be accepted by the Board as specifications shall include everything necessary.

If a bidder does not understand any part or parts of the specification, or thinks he may have discovered an error, or errors, or believes that some particular specification is possible of two interpretations, he shall immediately make inquiry to the Architect, in writing, before bidding and satisfy himself as to the interpretations of the point in question. The questions will be answered in writing. Failure to ask questions will be considered as absolute understanding of all the instruments hereto, and the Architect will hold the Contractor rigidly to the intent of there [these] plans and specifications, as well as to all the details hereto attached.

Measurements

Figures shall be taken in preference to measurement by scale. Details have the preference over the elevations, plans and sections. Dimensions in connection with old building are approximate and contractor will enter into contract on his own responsibility as to their accuracy.

In cases of discrepancies or conflict in any of the instruments furnished, the matter shall immediately be submitted to the Architect, who shall interpret same, which decision shall be final and binding.

Tests and Labels

Contractors for material shall furnish for inspection, if called upon to do so, materials, etc., for the inspection of Board and Architect, and shall make all tests called for, and tests being made at the expense of the Contractor.

All materials of a label character shall be delivered to the building with their labels on same, and said labels or manufacturer's names shall be left on same until they are used.

Subcontracts

If called upon by the Architect, the Contractor shall submit for inspection a certified copy of any contract, or contracts, which he may have with any sub-contractor or manufacturer, showing grade and quality of goods or labor contracted for (price not being essential).

Subletting of contracts in no way relieves the Contractor of his responsibility.

[fol. 278] The Architect and Owner will not enter into any discussion between the Contractor and the Sub-Contractor in any shape, manner or form, except as to the quality of material furnished, or workmanship performed.

Materials

It is expressly agreed that any and all material brought upon the premises, which is subjected to contract, shall be immediately considered as belonging to the building, and shall not be removed without written consent of the Architect.

It is further agreed that any material which should be rejected by Architect as unfit to enter into the building, shall be immediately removed from the premises and new materials supplied. In this connection, the Architect reserves the right to protest against the employment on this building, at any time, of any men or sub-contractors, who, in the Architect's judgment, are unfit in a mechanical way or because of lack of care in their workmanship. Contractor will immediately replace same with other men. Subletting of any part of this construction shall be valid only when in absolute strict accordance with plans and specifications herein outlined.

Drawings

The plans and specifications are on file at the office of the Clerk of the Board of Education, and at the office of W. H. Fisher, 1214 West 20th Street, Oklahoma City, Oklahoma, where same are accessible to all parties wishing to inspect same.

These drawings are to be used as instruments of service for this building only, and all copies, except one, which shall be filed with the Clerk, shall be returned to Architect at the completion of this building.

Rules

Contractor is to provide all material or labor necessary for the perfect execution of the work her in [herein] described in accordance with the intent as set forth by the instruments furnished for his guidance. The contractor shall, at all times, protect all material liable to damage by the elements; he shall obtain all necessary permits; he shall safeguard the public who have caused [cause] to be upon or pass the site; he shall afford ample facilit es for inspection to Superintendent.

Insurance

The owner shall furnish Insurance covering fires and tor- [fol. 279] nado necessary to protect his own, the Contractors and the Bondsman's interests, as they may appear; the Contractor shall comply with the State Laws coming under the heads of the "Workmen's Compensation Act."

Firemen

The Contractor shall keep a qualified foreman on the premises all the time during construction, who is capable of using an engineer's level. This level shall be kept in perfect adjustment, so that here [that there] will never be any question as to levels, etc.

Bonds

The successful Contractor shall comply with all the laws of this state relative to the subject of "Contract Bonds", and "Statutory Bonds", and the Board reserves the right to accept or reject any bond not meeting with their approval, and these bonds shall be held to remain in full force and virtue until such time after the final completion called for by the guarantees asked for and set forth as necessary from materials and sub-contractors in these specifications, all which understand that this period in question shall be past exporations for filing lien.

Payment

The Contractor shall file with Architect ten (10) days before the first of the month, a list of all material received and labor performed since last monthly estimate. Upon the receipt of the same, the Architect will proceed to make out an estimate for the Contractor and certify that such amount is due him. The Contractor will then receive 80% of the gross amount of this estimate, the remaining 20% being retained until the completion of the contract. If, however, it is deemed by the Architect to be for the best interest of the Owner to withhold this estimate until items found not in accordance with the contract, he shall be entitled to do so, until Contractor has made such item or items satisfactory. It is hereby mutually understood and agreed by all parties hereto that no estimate shall be considered as payment or acceptance of any material or labor which may be or afterwards be discovered to be faulty. Immediately upon receiving this estimate less 20%, and give same to Contractor. The Contractor shall, before final payment is made, duly file with the Board all guarantees and other obligations called for in these instruments, as well as make affidavit as to all claims still outstanding for material or labor furnished or performed on this building.

[fol. 280]

Damages

Should the Contractor fail to complete this building within the time set forth in his contract, through no cause excepted in contract, he shall be held as justly owing the Owner as liquidated damages, the amount of rent money and damages which the Owner may have experienced on account of such default.

Arbitration, Style, and Form of Contract

This item will be fully taken care of in the contract, which shall be of the uniform type, as adopted for general use by the American Institute of Architects and the National Builders Association.

Laying Out the Building

The Board will give Contractor a grade level and the Contractor shall exercise great care in laying out the build-

ing; he shall establish all corners and angles of the building permanently, using an engineer's transit for same. The Architect reserves the right to employ, at the Contractor's expense, an expert engineer to check said lines of building, after same are so laid out. After Board has established the bench mark above mentioned, the Contractor will take all his measurements above and below grade line, which said grade line shall be the grade line as shown upon the elevations and sections.

Drawings and Specifications

The Contractor is to examine carefully this specification as each word will remain in full force unless changed by written order of the Architect and Owners. Failure to understand the drawings and specifications, and ignorance of either, will not be accepted as an excuse for inferior work or commission not ordered or specified.

Shop Drawings

Shop drawings full size or scale details, as the case may require, shall be furnished by Contractor to Architect, for all interior or exterior work, and no work shall be done without them. In their preparation, minor modifications may be ordered by the Architect before execution of the work.

Quality of Materials

All materials shall be of the best of their respective kinds and all workmanship shall be of the quality in keeping with the material and design. Should any Contractor introduce any materials different from the sort herein described, or meant to be implied, they shall be immediately [fol. 281] removed at the Contractor's expense at any time during the progress of the work, and Contractor shall be charged for whatever damage may result from such cause.

Extras, Alterations, or Omissions

The Owners, through their Architect shall have the right to make any alterations, omissions or additions *of* [to] . . from the specifications, or drawings that they may find

necessary, without rendering void any contract based on these specifications and accompanying drawings; and all such alterations, omissions and additions shall be agreed upon in writing between the Architect, Owners and Contractor before executing such work. No claim for Architect has been notified and has rendered a decision as to the manner in which the difficulty shall be overcome.

Delay in Work

In case of delay by Contractor in providing the requisite material in the advancement of the work or from neglect or misconduct or inability, the Architect for the Board shall be at liberty to provide at the expense of the Contractor such materials and workmen as they may think proper and the costs and charges incurred shall be deducted and retained out of the contract amount.

Damages to Other Contractors

Each Sub-contractor for the different classes of work must take all possible precautions to protect the work of other Contractors on the building from being damaged by anything caused by or resulting from the execution of his own work, and he shall be held responsible to the Board for all damages that may be caused to work, or from carelessness of his employees; but the Owner will not be held responsible or accept any damaged work or enter into any dispute between the different Contractors about damaged work, but each shall turn over perfect work to the Board, at the completion of the building.

City Laws and Damages to Neighbors

The Contractor shall take out and pay for all necessary building permits, etc. The Contractor must be responsible for all violations of the laws caused by constructing sidewalks, streets, otherwise interfering with the convenience of the public during or as a result of the execution of his own work under these specifications. At the completion of the work, or at any time during the work, upon the order of the Architect, he shall remove all his rubbish or waste [fol. 282] material from the premises, leaving the entire building broom clean.

Special Testing

At the request of the Architect, the Contractor shall test any particular class of materials which said Architect shall designate. The test to be made at the laboratory selected by the Architect, and the expense defrayed by the Contractor.

The Contractor shall, at the request of the Architect, test the bottom of the trenches upon the basis of one square foot of bearing surface to see whether the ground has carrying capacity at depth shown. At [A] fifty per cent factor of safety must be used, and it must not show a settlement to exceed one-half inch in twenty-four hours. Average soil-bearing capacity 5,000 pounds.

Sets of Blue Prints

The Architect will furnish the successful Contractor one complete set of these instruments, and in case any more copies of these scale drawings and specifications should be required, they will be furnished to the Contractor for $10.00 per set.

Guarantee

Where a particular make, quality of material is specified, the Contractor shall secure from said company a guarantee of the character called for in the following specifications, and turn same over to Board.

Rights Reserved

The Board reserves the following rights: (a) to reject any or all proposals; (b) to waive any informalities [informalities] in any proposal; (c) to accept any alternate or any part or parts of any proposal at the price or prices therein given for the said item; (d) to make any additions, omissions, or substitutions for the work or material called for by the drawings or specifications, or both, without notice to the surety or sureties on the bond given to secure satisfactory compliance with the terms of the contract; (e) to demand additional security when additions are made, if, in the judgment of the Board such additional security is

required; (f) to require the Contractor to discontinue the service of any workman employed on the work who may be unskilled or otherwise objectionable; (g) to suspend any portion of the work embraced in the contract, whenever, in the opinion of the Architect, it would be inexpedient to carry on such work; (h) to withhold payments where shop drawings or engineer's certificates are not properly submitted, as hereinafter required. Before awarding a con- [fol. 283] tract under this specification, consideration will be given to the material which it is proposed to use, to the reputation of the manufacturer of same, to the financial and business standing of the bidders, and to their ability to properly and expeditiously carry out the work hereunder.

The Board shall establish the grade, placing a permanent bench mark near the site. They shall further give Contractor two axial lines conforming to the points of the compass for use in laying out the building; from this time on the building site and the building, as it progresses, is under the care of the Contractor, who shall be responsible for same.

Excavation

The Contractor shall excavate for gymnasium floor, and all foundations and footings, as shown on the drawings. He is to remove the surplus dirt from building site.

Contractor shall, also, as soon as foundation walls have set, do all filling shown or necessary where concrete floors or groundings for floors occur to bring interior level up to a point that when it settles will make the bed for the floors. The grade shown on the drawings i/ [is] the New grade, which is established by the Board. See footing details for exact depths of different footings and bearing walls. Contractor shall deposit excavated dirt on school grounds, as directed by the Board.

Concrete Work

Under Concrete work is included all foundations, footings, grouting, cement floors and concrete stairs. All cement shall be Portland.

Unless otherwise specified, all concrete is to be composes [composed] of one sack cement, two cubic feet sanz [sand],

four cubic feet crushed rock or washed gravel. It being understood that one sack of cement weighing 94 lbs., is equivalent to one cubic foot. This mixture shall absolutely be maintained by the machine and good, clean water sand used. Where cement does not set properly, it is to be removed and the refuse not used again. Do not put this concrete in too wet and Contractor shall chop and tamp so that no voids shall remain.

Cement groutings under floors shall be 1-2-4, and shall be at least 3-1/2" thick, tamped. Over floors having cement finish a top of not less than 1" thick shall be troweled, same being composed of one part cement and two parts sand, [fol. 284] and applied over grouting while green. Floor to be troweled smooth and show no tool marks. Before putting any concrete in position, all forms and dirt shall be thoroughly wet. Where reinforcements, ducts, conducts [conduits] and sleeves are in place, use great care not to disarrange them. See, however, that the concrete settles in all the corners. Upon stopping work, all concrete shall be level. Where wood floors are on concrete, in bed 2x4" Beveled screeds 16" O. C. All exposed concrete shall be surfaced.

Forms

Construct forms for the concrete walls, as shown, of good, heavy material, properly braced, reinforcing the concrete as shown on sections; said forms to be constructed of good sized lumber, so supported that they will stand the pressure without bending, and of such a character that they may be removed without hurting the concrete. Where directed by the Superintendent, additional showing [shoring] shall be placed. Use as little wiring as possible, as they will have to be out [cut] off and the -hole [whole] water proofed when they come below grade. Where old concrete basement stairs are removed by lowering present floors, join up old concrete with new floors level in workmanship manner.

Where cement floors are shown in second floor toilets, bridge floor joists thoroughly and fit wood form floor between joists firmly in place to receive cement. Drop form floor two inches below tops of wood joists, and bevel tops of joists to feather edge. The- [Then] place cement floor

3½" thick, including finish on top of wood form floor and trowel to smooth finish. Waterproof cement floor with Trusoon Integral Waterproofing and build against floor at wall line all around cave mould and cement base 6" high, making cove and base monolithic with cement floor to have no cracks for water to leak through. Take great care where waste and supply lines pass through floors. Paint finish cem-*tn* [cement] floors in toilet rooms with two coats of approved cement paint, after plumbing fixtures are in place and protect until dry.

Masonry

All brick work must be wll [well] wet down in dry weather and all mort*o*r [mortar] shall be composed of good, well-slacked lime and sharp, clean sand, with one-fourth cement added to the lime putty. Lime and sand 1:3 for brick work. Lime to be equal to Ashgrove.

[fol. 285] **Common Brick Work**

All brick used for backing exterior walls and where otherwise shown shall be good, hard-burned brick. No soft or cracked brick will be allowed on the job. All walls shall be bonded every sixth course. Hollow tile, of approved type, may be used for backing up above the second floor line.

Brick contractor shall erect his own scatfor*d* [scaffold], and shall cover all walls at night to protect from weather. Leave openings for beams, anchors and pipe chases where required or shown. All walls shall be laid to a line, both side slushed, leaving no holes. The brick work shall properly fit around all openings. Build in all anchors furnished by other craft-men [craftsmen]. Set all lintels where shown. Do not strike the joint on interior walls. Do not run any part of one scaffolding height above the other. Level all work up at every scatfor*d* [scaffold] height. No mortar joints will be allowed larger than ½ inch.

Face Brick

The brick shall be laid in natural mortar, with a joint of ⅜" struck fluch [flush] then brushed. Flemish bond all these brick every seventh course. The joints in the alter-

nate courses shall be plumb one over the other and all joints shall be uniform. They shall be laid accurately to a line, level, and shall have corners and jambs plumb and straight. Cover all walls at night, or when raining.

The Contractor shall lay each working story and all openings upon a pole, so that the heights of the openings and the joints of the brick wall work out exactly right. No split brick will be allowed to make additional height. Contractor shall clean the brick work at completion, removing all surplus mortar and stain.

Cut Stone

All new cut stone shall be Carthage stone to match old stone (smooth face). All sills to have lugs two courses high and wash to a 5" face. No 'Drip'. All new window caps as per detail. All stone work on north elevation except coping is salvage stone. Provide new stone coping 4"x10" complete on new and old building. All windows in new part get new stone, except twelve salvage windows.

Sheet Metal

Flash and counterflash at all fire walls and points of water danger with G. I. Furnish and put in place, as [fol. 286] shown, on roof, three 30" galvanized iron Swartwout Rotary Ventilators with tight damper. Furnish and install all galvanized iron downspouts [downspouts] and gutters, where shown. (Note roofing contractor to furnish and install all flashing required for roof.) Furnish and install tin lighting for footlight trough.

Structural Steel

Furnish and put in place all straps, belts, joist anchors, for every fifth joist, steel trusses, lintels, as shown on plans and sections. Provide bearing plates, for beams and trusses with proper anchors.

Install gas pipe flag staff. Put pulley at top and bottom of flag staff. Furnish and install vent registers 14x12" for all vent openings.

Tear down parts of existing walls and prepare brickwork to receive new truss in the location shown on plans.

Lintels, according to detail, shall be provided for openings in new building except openings filled with windows salvaged from the existing north wall. Twelve windows in the front elevation are salvaged windows and require now no new lintels. All other windows in new building require new lintels.

Plastering

The plasterer, before commencing work, must inspect all walls, furrings, etc., and see that they are absolutely in such condition that he can make first class work. He is to plaster all walls and ceilings, throughout the building, and patch all plaster in the old building, which is not in good condition. He shall apply separately two good coats of Agatite, Acme or its equal brand of wall plaster. The mixture shall be in strict accordance with the directions of the company making same. The finish coat shall be a heavy coat composed of 60 per cent of Best Bros. Keene's Cement and 40 per cent lime puttey [putty], mixed with enough sand to make a rich plaster, troweled to a smooth fine [sand] finish, making three coats in all and floated and it shall be strong enough that it will not rub off when dry. All walls must be rodded from top to bottom and must be straight horizontally and plumb, showing no lips. Where stud partitions join brick walls, put metal lath in angles. Install metal corner beads on all corners and angles. Where lathing is to be done, it is to be No. 1 Yellow Pine lath, except as otherwise particularly mentioned, heavily nailed into position. The sand is to be carefully selected for finishing coat. The electric outlet boxes are [fol. 287] to be applied before plastering is done. All lime used shall be run off at least fourteen days before being applied. The window jambs are to be plastered, as per detail. Patch all cracks in the building at completion. Clean all refuse and wash all spots off the windows at completion.

Space back of blackboard shall be plastered with Keene's Cement smooth finish.

Hardware.

Hardware to be put in place by the Contractor. By finish [finish] hardware is meant all locks, butts (1½ pair

to each door, door steps, door closers for outside doors, transom lifts; aside from this, he is to install everything of every description necessary to the construction, including window weight, sash cord, etc. The sash cord shall be Silver Lake or Sampson Spot Cord. All weights to balance the glazed sash.

Carpenter Work

The Contractor shall do all cutting for other mechanics where the materials are wood. He is to put on grounds around all openings and aroung [around] walls for base, blackboards, picture mould, etc. He is to keep a plentiful supply of good block on hand to build in masonry at points necessary, or as directed by Superintendent. All dimension lumber used that is to be left in the build ng [building] shall be No. 1 Yellow Pine, free from all imperfections, which may impair its durability. All wood construction is to be perfectly nailed, framed and braced, bolted or anchored. He is to set all frames and keep them trued up from time to time, until they are out of danger, and then see that same are protected. He is to temporarily enclose building before plastering. All stud partitions of size given and double plated top and bottom [bottom] and securely attached to brick walls, with $\frac{1}{4}$" bolt, every three feet in height. Run 16" metal lath in angles where wood partitions join brick. He is to keep all loose lumber free from nails and out of the way. Do all framing for vent openings in rooms and install vent registers.

Construct all wood girders where necessary. Note where vent openings are shown in class rooms. Same shall be framed to allow a complete circulation of air from the opening at the bottom to the attic. Allow no wall bridging or wall plates to obstruct this passage. Do all framing for balcony in gymnasium, according to sections. Balcony railings, entrance doors, plastered with wood cap and casings. Remove all existing lumber and millwork as shown, [fol. 288] being careful to damage as little as possible, and reinstall same in new locations as directed. Salvage stairs and alter and use some in new stair work, as deemed advisable by the Architect and Board and finish new work in acceptable manner. Remove nails, clean and square up old material before using in new location and use great

care in cutting, so as not to waste either new or old material furnished by the Board. Wasteful use of material furnished by the Owners by any Contractor, shall constitute sufficient grounds and reason for imposition of a payment penalty levied by the Architect or Owner. Leave no old material standing in the old building, which is not a part of the completed structure and clean and pile, in an orderly way, all salvaged material not used in the building.

Doors

All interior doors shall be as called for in schedule No. 1 quality and glazed interior doors to have W. P. stiles and hung on suitable butts. Exterior doors No. 1 W. P. with solid stiles and panels glazed as shown.

Sash and Frames

Put in place all sash and frames as shown. Sash are to be No. 1 W. P. or No. 1 Cypress 1 ½" thick. Frames to be No. 1 Yellow Pine, with W. P. Sills and brick mould. (See Details). All frames shall be provided with 2" cast iron sash pulleys, sash to be checked with neatly moulded stops. Remove sash in Principal's room and install pair of casement sash to fill openings.

Glass

Put in place all glass, except otherwise mentioned, a careful selection of D. S. A. free from defects, which will not impair its looks or durability.

All glass to be firmly set in sash and not slipped until dry and primed.

Floors

Put in place joist of selected No. 1 grade Yellow Pine, sizes as shown on sections, set in place with crowning edge up, secured properly in place. Cross bridge every 7' with 1x4 double nailed at each end with 8D nails. All joists sized at bearings. For wood floor on concrete, imbed 2x4" beveled screeds 16" o/c. For all floors, except on concrete fill, lay a rough floor of No. 2 boards double nailed at each bearing.

[fol 280] Lay all floors of 13x16"x2¼" Edge Edge Grain Y. P. "B" flooring. Drive up both flat and endwise

until no cracks remain. Nail securely every 16". Square the ends before laying and throw out defective boards. Surface all irregularities.

Partitions

All wooden partitions are to be as shown with studs 16" o/c. No 1 V F set with absolutely straight studding, double plated top and bottom and double around all openings. Where bearings, they shall be 2x6" x blocked solid every 6 ft. in height with 2x4's.

Blackboards

Put in place genuine Hyloplate blackboards where marked on plans, 3 feet high. Put in place with cap trim at top and sides and chalk through (trough) at bottom (See detail). Get heights from Superintendent before plastering. Plaster space back of blackboards with Keene's cement smooth finish, applied absolutely free from waves and sand holes or sand from finish above.

Trim

Put in place on the wall of this building, all trim of every character as shown on drawings. It is to be hand smoothed, [smoothed], selected "B" V F finish or better, and shall fit snugly to the plastering. It shall be thoroughly kiln dried, all interior jambs shall be 1 1/8" of "B" finish. All studs must be leveled up and all caps, etc., horizontal and in line.

Picture mould around all class rooms. No Hammer marks will be allowed on finish. All nails shall be neatly set. All trim must be firmly secured in position. No casings shall be spliced. All case moulding shall be 45 degree mitred where they join.

Roof

All dimension lumber, as shown, cross bridged, as per floors. All girders, where shown or necessary to frame roof, shall be bolted and built up in careful manner. These roof rafters shall be spaced 16" o/c, sloped so that the water will be conveyed to the downspouts shown on elevation. All rafters shall be braced at center of spans. Enough

[Entire] roof to be covered with #2 Y.P. boards, double nailed to each bearing with 10d nails and tripple [triple] nail the board wider than 8". Build all bulkheads as shown or neceiwary [necessary] to deliver the water to down- [fol. 290] spouts throat. Have brick masons build in all strips for flashing. Clean all the roof off before starting and apply roof as follows:

1. Cover all roof with layer of building paper.

2. Apply over entire roof surface two layers of tarred felt, lapping each sheet 17" over the preceding one and mapping with pitch the entire 17", and seeing that, in no place, shall felt touch felt.

3. Cover entire roof with one coat of pitch.

4. Over entire surface lay three (3) plies tarred felt, lapping each 22" over preceding layer and mopping the 22" over preceding layer and mopping the 22" uniformly so that, in no place, shall felt touch felt. Take great care around openings, etc.

5. Over this entire surface spread a layer of pitch, 50 pound to the 100 sq. ft. and cover with 400 pounds of gravel to each 100 sq. ft. while hot. G-avel [Gravel] must be imbed and be free from dirt.

Where pitch is specified, it shall be equal to the Barrett Diamond and shall be inspected. Where felt is specified it shall be equal to the Barrett's No. 2 felt, weighing not less than 15 lbs. per sq. ft. single layer.

Take great pains to see that there are no leaks around the downspouts. The entire roof to be put on by an experienced roofing Contractor. All base and counter flashing shall be furnished and applied by roofing Contractor. The Roofing Contractor shall furnish the Board a Company Guarantee ag-inst leaks for a period of five years.

Painting

The Painting Contractor is to examine all work to be finished by him. If not in proper condition, the Superintendent is to be notified. Otherwise the Painting Contractor will be held responsible for his work not coming up to the intent of these specifications. All material shall be the best of their several kinds and qualities, as herein speci-

fied. Such material shall be delivered to the building with the name of the maker upon same and in proper amount to complete work. No adulterations of these materials will be allowed.

The Contractor is to carefully consult the plans and specifications as to the amount of work to be finished. He shall not mix his paints upon the floors not proctected [protected]; he shall remove all spots from the building [fol. 291] before completion and must repair any damage to his work, no matter by whom caused. All exterior work and interior of new and old toilet rooms finished with a priming coat and two coats of pure lead and linseed oil; all sash to be stripped on the outside, making same match the other finish. Interior trim for all class room and Auditorium shall have one coat of Light oak Stain and three coats of interior varnish, Standard Varnish Company's or Glidden's; sand between coats. North entrance doors stained, with five coats exterior varnish. All galvanized iron and metal work covered with three coats mineral paint of approved make. Color selected by owner.

Electric Wiring

Electric fixtures to be furnished and installed by the Board. The Electrical Contractor is to install the Elec-ric [Electric] Lighting System run in conduits for Auditorium and knob and tube for all other rooms, wires left ready to take fixtures. All above to be in accordance with the Underwriters Laws, governing same and said system shall pass Underwriter's rigid inspection. All lights to be operated from local switches and cabinets, as shown on plans. This Contractor to furnish all fuses for original installation. Visit old building and estimate salvage material.

Tests

On completion of the work, the installation shall be free from grounds and short circuits. All connections are to be soldered and tapped at outlets.

Outlets

At each and every switch, wall, ceiling, receptacle, or other outlet shown, install a metal outlet box of style most suitable for the outlet.

All outlet boxes must be rigidly set in place by approved methods and those extending for fixtures, shall be provided with fixtures stud or in the case of large fixtures, a hangar for independent support.

Stage Lighting

All stage and auditorium lights to be controlled from switchboard on stage. Furnish and install three circuit border light. Footlights 12 inches on center, installed in three circuits.

Cabinets

Main service cabinet moves to new location. Move cabi- [fol. 292] net to stage of auditorium; install Lantern Cabinet complete with switches, cutouts and fuses, metal cabinet for picture projection booth in rear of auditorium. Cabinets to have metal door lock and key. Provide meter loop for lights.

Local Switches

Local switches shall be two-button flush type, completely enclosed in box of non-breaking insulating material with brass beveled edge plate to match finish of Hardware.

Plug Receptacles

Plug receptacles shall be of the disappearing door type with cover plate, located where shown and one on each. Install 50 amp floor plug on stage floor, side of stage as directed.

Plumbing

Rough in plumbing and install plumbing fixtures selected by Board in second floor toilet rooms. Run waste to existing waste line in basement and connect vents to existing vent stack cutting no floor joists, so as to weaken same. Provide ¾" supply lines to all fixtures, as well as 1-½" waste lines, properly trapped and fitted with accessible cleanouts. Properly caulk and test out to satisfaction of Owner before leaving the work. Install gas lines as directed by the Board.

Plumbing contractor shall install supply and waste to 6' urinal in boys' toilet room in basement, providing supply line with cut-off valves and waste properly vented.

Contractor making cement floors in toilet rooms shall depress floor at back of urinal and raise floor at front, to give good fall and erect marble back, sides and screen with marble now on hand and brace same firmly in place, giving Board list of fittings required in plenty of time to allow the Board to get material to site when needed.

Mr. Anderson: The plaintiff rests.

Mr. Lee: May we have the jury excused a few moments, if your Honor please?

By the Court: The jury may be excused for ten minutes.

(Thereupon, the jury was given the usual admonition and retired from the court room.)

[fol. 293] DEFENDANTS' DEMURRER TO EVIDENCE

Mr. Lee: The defendants and each of them demur to the evidence of the plaintiff for the reason-,

First. That said evidence shows that no sworn statement or proof of loss as required by the terms of the policies of insurance sued upon herein, was ever furnished by the plaintiff to the defendants or either of them.

Second. For the reason that the evidence shows that no proofs of loss were furnished to the defendants or either of them as required by the terms or provisions of the policies of insurance sued upon herein, and such evidence wholly fails to establish facts sufficient to constitute a waiver of such proofs of loss or any of them.

Third. For the reason that the evidence of the plaintiff shows that the cause or causes of action of the plaintiff, if any, ever existed against the defendants or either of them, are barred by the Statute of Limitations.

Fourth. For the reason that the evidence of the plaintiff wholly fails to establish a cause of action or right of recovery on the part of the plaintiff against the defendants [defendants] or either of them.

(Thereupon the demurrer was argued to the court, after which the court overruled the demurrer of the defendants, and the defendants and each of them excepted.)

(Thereupon the jury was returned to the court room and the trial resumed, and further proceedings had as follows:)

E. E. Doggett was thereupon called as a witness on behalf of the defendants and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Thurman:

Q. State you name and residence.

A. E. E. Doggett, 1919 West Tenth Street, Oklahoma City.

Q. By whom were you employed in the summer and fall of 1925?

A. By the T. E. Braniff Company.

Q. In what capacity?

A. State agent.

Q. And what was the general nature of your duties for the T. E. Braniff Company?

[fol. 294] A. General field work.

Q. And of what did that consist?

A. Well, appointing agents.

Q. In appointing agents you mean going out and selecting agents or executing authority to the agents?

A. Not necessarily so. We make a good many appointments by mail.

Q. Is that the duty you performed?

A. Yes, sir.

Q. Those were you duties at the time I inquired about?

A. Yes, sir.

Q. At that time through the summer and fall of 1925 were you employed or paid by the Concordia Fire Insurance Company for any services?

A. No, sir.

Q. Have you been since that time?

A. No, sir.

Q. Mr. Doggett, in the summer or fall of 1925, did you make any inspection of a school building at, I believe, Nor-

folk, near Yale, Oklahoma, in School District No. 98, Payne County?

A. I did not.

Q. Do you know where there is such a building?

A. I do know that there is possibly such a building or was such a building at about that location.

Q. Have you been on those grounds or in that building?

A. No, sir.

Q. Did you ever make any estimate of the value of that building?

A. No, sir.

Q. Did you ever at any time make any statement to Charles G. Morris that you had made any inspection or valuation of that building?

A. I did not.

Q. Do you know Charles G. Morris?

A. Yes, sir.

Q. Now residing at Oklahoma City, who used to reside at Yale, Oklahoma?

A. Yes, sir.

Q. Do you know what business he was engaged in at Yale, Oklahoma in 1925?

A. An attorney, and interested in an undertaking business.

[fol. 295] Cross-examination.

By Mr. Anderson:

Q. You say you were agent for T. E. Braniff Company?

A. I was in their employ, yes, sir, as a state agent.

Q. What were your duties?

A. General field work.

Q. Of what character?

A. Appointing agents.

Q. Anything else?

A. General details as to matters that might come up in regard to accounts with agents when I was out on the road, and inspections when I was asked to make them.

Q. Were these local agents under your supervisions and direction?

A. Well, they were not exactly under my direction. They were under the direction of the office.

Q. That is the T. E. Braniff Company?

A. The T. E. Braniff Company.

Q. Now, did you have anything to do with the approval of the policies that were issued by the local agents?

A. No, sir.

Q. Who did that?

A. The underwriter.

Q. Who do you mean by the underwriter?

A. The underwriter that stays in the office.

Q. In the T. E. Braniff Company?

A. In the T. E. Braniff Company.

Q. That was the company you worked for?

A. Yes, sir.

Q. Was the T. E. Braniff Company an agent of some kind of the Concordia Insurance Company?

A. They were, yes, sir, at that time.

Q. What kind of an agent were they of that company?

A. General agents.

Q. What was their territory?

A. Oklahoma.

Q. What are the duties of a general agent?

A. To appoint agents and produce business.

Q. And pass on policies?

A. We don't pass on them finally, no, sir.

[fol. 296] Q. You pass on them, though, after the local agent writes them?

A. Yes, sir.

Q. Either approve them or reject them?

A. Yes, sir.

Q. This policy that was pritten by Mr. Morris for the Concordia Company on this property and was approved by the T. E. Braniff Company?

A. Yes, sir.

By the Court: Was it approved by the Concordia Company?

A. I can't say as to that.

Redirect examination.

By Mr. Thurman:

Q. What do you mean that the policy was approved by the T. E. Braniff Company?

A. Well, I mean, not the policy but the daily report passes through our office, and is recorded and passes on to the home office for final approval.

Q. You mean that it wasn't turned down?

A. Yes, sir.

Q. What would be the reason for turning down the policy?

A. Well, there would be several reasons. If it was a mercantile risk, and we got an unfavorable report we might turn it down.

Q. What about bad location or anything of that sort, would that be an ordinary reason for turning a policy down?

A. If it developed that the physical condition was bad it would possibly be turned down.

Q. At the time these policies are written by the local agent, as I understand it, and the reports sent in to the T. E. Braniff Company, is there any special attention given to the actual valuation of the property where it is in the nature of a public building that is insured?

A. No, sir.

Q. Then, if I understand you, when such a daily report is sent in to the T. E. Braniff Company of a policy written in some company that is in their office, unless there is something unusual, out of line, that is passed right along to the company?

A. Yes, sir.

Q. And it is not a question of writing approval on it or going into the question of the value of the building in con- [fol. 297] nection with the amount of the insurance and such matters as that?

A. That is right.

Mr. Anderson: I object to all that as leading and suggestive.

Mr. Thurman: Yes, I presume it is.

Recross-examination.

By Mr. Anderson:

Q. If the Braniff Company, the one that approves these policies, considers that there was too much insurance on that property they would turn it down, wouldn't they?

A. We leave it entirely to the agent that writes the policy.

Q. Entirely up to the local agent?

A. Yes, sir.

Q. That is solely within his care and within his authority?

A. Yes, sir.

Q. That was Mr. Morris in this case?

A. Yes, sir.

Q. Are there ever inspection as to values before policies are approved?

A. No, sir.

Q. Regardless of the amount of the policy?

A. No, sir.

Q. Never any variation from that rule?

A. I just don't quite understand you. You mean when a daily report comes in do we question whether the value is there or not?

Q. Do you ever make any inspections as to the valuation?

A. Yes, sir, we do sometimes.

Q. What are the conditions under which you make inspections?

A. Well, it is just a general inspection. Occasionally an inspection slip is made out by the home office and mailed to us and when the state agent visits that territory why he then inspects the property.

Q. For what purpose?

A. Just to get the general line on the property.

Q. Then what is the purpose of that information?

A. To find out if it is a desirable risk.

Q. From what standpoint?

[fol. 298] A. From all standpoints. Most generally from the moral standpoint and physical standpoint.

Q. Any other?

A. Well, there are many things that come up that cannot be foreseen at the time an agent writes a policy that is not disclosed until an inspection is made.

Q. *Tt* [It] is the duty of the local agent who writes the policy to inspect the property?

A. Absolutely; we depend entirely upon them.

By the court:

Q. Do I understand that the amount of insurance that a company would place upon any given risk is entirely determined by the local agent?

A. It is at the time it is written, yes, sir. If it is later inspected and it develops there is over insurance on it, of course it is brought to the attention of the agent. We have no way of knowing, a good many risks, what the appearance of them are.

By Mr. Thurman:

Q. Do you know what the usual practice of the local agents is with reference to the amount of insurance on any particular property? Is that the amount that is applied for or is it fixed by the local agents?

A. Well, we always assume that the local agent writes insurance according to the policy contract; that he should not supply insurance for any more than the assured can collect in the event of fire, taking into consideration the replacement value of the property.

Q. And as I understand it, that is because of the provision in the policy that the company cannot be liable for more than the replacement value of the property?

A. Yes, sir.

Q. After they figure the depreciation and so forth?

By the Court:

Q. Did you have any knowledge that this company represented by the Braniff Company for whom you were writing out a policy on this particular building?

A. Did I have knowledge of it?

Q. Yes, sir.

A. Yes, sir.

Q. Did you know the total amount of insurance that was written on the building?

A. At that time?

Q. Yes, sir.

A. It would be hard for me to say yes or no to that from memory.

[fol. 299] Q. Would the daily report of the agent cover that?

A. If it was incorporated in the daily report it would show; otherwise we would have no way of knowing.

Q. Your daily report calls for that, doesn't it?

A. Yes, sir, it isn't always completed, though.

Q. If a complete daily report comes into your office what is your attitude on that report?

A. If it is desirable business we pass it.

Recross-examination.

By Mr. Anderson:

Q. It is also shown on the Concordia policy the amount of the insurance.

A. Sir?

Q. The total amount of the insurance is shown on the Concordia policy, isn't it?

A. No, sir, not on the policy.

Q. Are you sure of that?

A. I don't think so.

Q. Do you know that, or are you just guessing at it?

A. I don't recall, there are so many different forms.

Q. I show you Plaintiff's Exhibit 2, as being a schedule attached to the Concordia policy that was issued in this case.

A. That isn't the policy.

Q. That was attached as a part of the policy, wasn't it?

A. No, sir, this is the daily report, record of the policy.

Q. That is the daily report copy of it?

A. Yes, sir, copy of it.

Q. This is what is sent to the Braniff Company?

A. No, this is a copy of what is sent to the Braniff Company.

Q. I say, that same information?

A. Yes, sir.

Q. Is the total amount of insurance on this property shown on that instrument?

A. Yes, sir.

Q. How much does it show?

A. It shows $75,000.

By Mr. Thurman:

Q. I will ask you whether or not this is an ordinary form of policy in common use or whether this is an unusual

form on account of the peculiar situation for the Concordia Fire Insurance Company.

[fol. 206] By the Court:

Q. What do you call those forms you attach to the policy?

A. Endorsements. This is a regular usual form of mercantile fire policy with standard form attached. There wasn't room enough on the form to distribute the insurance, and that was put on there, is the only thing unusual I see about it.

By Mr. Thurman:

Q. You don't know anything about the form on the other policies of this property?

A. No, I have no knowledge of the forms that are used.

Q. What I intended to ask you was whether or not the forms of the substance that is inserted in the standard form of policy is used by the different companies always, is it not?

A. They are supposed to be exactly alike.

Q. But what is shown on the daily report is not always the same?

A. No.

By the Court:

Q. Why shouldn't it be the same?

A. I might explain in this way: A good many times several agents write policies on the same risk and they sometimes vary, and it isn't discovered until possibly a loss occurs, and the policy is in the hands of adjusters, and at the time it is discovered they are not exactly alike.

By the Court:

Q. Aren't all of your forms exactly alike?

A. These others are. I have reference to the agent in writing them. One agent may write a policy and word it a little different than the other.

By the Court:

Q. The form of policy is exactly the same, isn't it?

A. Oh, yes.

By the Court:

Q. Has to be?

A. But you can put an endorsement on that or riders which might make them different.

By Mr. Thurman:

Q. There isn't any place in this daily report for the inserting of the total amount of insurance, and in this particular daily report there is distinct writing in typewriting above the printed matter, and the blanks which are filled in, this policy being for $25,000 to cover those prorated portions of each of the following amounts, and then the amounts are set out here.

By the Court: Yes, I have examined it.

Mr. Thurman: That portion is written in by the agent [Vol. 301] that happened to write up this policy, and what I am getting at is, he has no idea how the other policies in this case may have been filled in.

By the Court: But you must show the total amount of insurance.

Mr. Thurman: Oh, no.

By Mr. Thurman:

Q. You have been asked concerning the over-insurance of property and the reduction insurance on property and you have testified concerning it. Now I want to ask you in practice whether or not insurance on a public building such as a school building for the amount of $67,000 would be reduced or attract any attention if the actual physical value of the property after the allowance for depreciation was in the neighborhood of $50,000 or $52,000?

A. We never look with any suspicion on a policy covering a public building as to the insurance, as to the value.

Q. You just figure that the public or school district or city or county don't insure their property for the purpose of burning it down?

A. Yes, sir, that is it exactly.

Q. So the question of value does not ordinarily enter in it when you are determining the amount of insurance or sending a policy on in to the company, is that true?

A. That is true. We ordinarily write any amount an agent might ask us to on a brick school in a country district.

By Mr. Anderson:

Q. You know they wouldn't have any incentive to burn it as public officials of the district, don't you?
A. I don't suppose so.
Q. That is one of the reasons it doesn't incite any suspicion, ordinarily. That is right, isn't it?
A. Yes, sir.
Q. And another is you know they would not have any interest in insuring it for more than what it was worth?
A. Yes, sir.

By Mr. Thurman:

Q. But they might be mistaken as to what it was worth?
A. Oh, yes, we find that very often in checking up values.

By the Court:

Q. When do you find that out, before or after the fire? [fol. 302] A. Sometimes we don't find it out until after the fire.

(Witness excused.)

J. E. Wilkinson was thereupon called as a witness on behalf of the defendant and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. State your name.
A. J. E. Wilkinson.
Q. Where do you live?
A. Oklahoma City.
Q. What is your business?
A. State agent, fire insurance state agent for Trezevant and Cochran of Dallas.
Q. And what is their business?
A. General agents, fire insurance general agents.

Q. What was your business in 1925?

A. Special agent for this same firm.

Q. Do you know where the school house that is involved in this case was located?

A. I know where it was located, yes.

Q. Have you ever been by there?

A. I have driven past it.

Q. Did you ever inspect that school house?

A. I never did except from a glance on the outside. I never was inside the building.

Q. Did you go there at any time with the local agent for the Fire Association or for Trezevant and Cochran?

A. I was never there with the appointed agent of the Fire Association; that is Mr. Sloan. I went out there at one time with Mr. Hall who worked for Mr. Sloan, but he is not an insurance agent for the Fire Association.

Q. Did you go inside the building?

A. No, sir, we went out to the building, and the building as I understood it, was surrounded, it was surrounded by a big high barbed wire fence and apparently all locked up and we couldn't get in.

Q. You didn't even go inside the grounds?

A. Not even inside the grounds.

[fol. 303] Q. Did you ever make an estimate of the value of that building?

A. No, sir, I couldn't make an estimate of the value of it. I only visited it once and it was impossible to make an estimate because of the fact that you couldn't tell what was inside by looking at the outside.

Q. When was that that you were there?

A. To the best of my recollection it was sometime, it seems to me, the fall of 1925. I don't remember the exact month. I don't have any periodical time to make visits to those towns, and I just happened to be in Yale on that occasion. It seems to me it was sometime in the fall of 1925.

Q. Now, do you know whether or not Mr. Sloan in reporting in his daily report, or in his reports to the companies, in this case the Fire Association of Philadelphia, gives any information as to what other insurance there is on the property?

A. I have never seen a daily report on this particular risk. In fact, I knew we were interested on the risk, but I never saw the daily report, and as a general rule we do not

get such information as to the amount of other insurance. Our forms do not provide for it. That is, the printed portions of the form, only, and an agent will write a policy on what we term a schedule form and he will show the total amount of insurance, but as a general rule, you don't get that information in one per cent of the cases.

Q. You never saw the form, you say, on this particular risk?

A. I never saw the daily report or policy on this particular risk.

Cross-examination.

By Mr. Anderson:

Q. You say you did go out there and inspect this property?

A. We went out there for the purpose of making an inspection, yes.

Q. Who asked you to do that?

A. Mr. Hall.

Q. That was the young man that was in the bank with Mr. Sloan?

A. I understand he was cashier in the bank with Mr. Sloan.

Q. And did more or less of the work for Mr. Sloan in the agency?

[fol. 304] A. No, I wouldn't say that. Mr. Sloan does most of the work. I think there is no authority designated to Mr. Hall.

Q. Your designation of authority is to Mr. Sloan?

A. Mr. Sloan.

Q. He works for Mr. Sloan?

A. Yes, sir.

Q. And asked you to go out and inspect this property for the purpose of determining how much insurance should be written on it?

A. No, he didn't ask me how much insurance should be written on it. The purpose of my inspection was to determine from a physical or moral standpoint whether the risk was acceptable to my particular agents.

Q. And you didn't have any purpose of inspecting it as to its value?

A. Well, that comes in. We always look at a risk from the moral hazard or physical hazard standpoint. The physical hazard, of course, covers the physical condition of the property, and from a moral hazard, as we look at it, that covers what we sometimes term a multitude of sins.

Q. Over-insurance is one of them?

A. Occasionally. That comes right directly in line with it.

Q. You don't knowingly write more insurance on a piece of property than it is worth?

A. We wouldn't want to. That would create a moral hazard.

Q. Whose duty is it to inspect it as to its value? Is that the duty of your local agent?

A. The local agent is supposedly the eyes of a company in the community in which he is appointed agent, and we try to select our agents with care and we find they make mistakes in many instances.

Q. When you say the eyes of the company do you mean for the purpose of determini-g values or writing insurance?

A. No. The agent cannot determine values because an agent, a local agent sometimes engages in many enterprises. He is a jack of all trades, as a general rule, and a master of none, and you could not expect an agent to give you an accurate determination of the values on any particular risk.

Q. No, but you leave it to him to determine whether the property is worth what it is being insured for, don't you? [fol. 305] A. Well, he is supposed to know that but I find in many cases they over-insure property.

Q. I understand, but that is one of his duties, isn't it?

A. No, I wouldn't say that. His duty is to secure business for the company. His chief duty.

Q. You expect him to do that?

A. We expect him to look after our business.

Q. You don't expect him to write business for more than the property is worth?

A. No.

Q. You say in a great many instances on the daily reports for your company, the total amount of insurance is not shown?

A. Is not shown, yes.

Q. And in many instances it is?

A. I wouldn't say many. In very few. I think I mentioned in one per cent of the instances.

Q. As to this particular one, the daily report covering the policy of your company in this instance you don't know?

A. I don't know about that.

Q. You don't know?

A. I have never seen the daily report or the policy.

Q. And if Mr. Sloan says it was on there the chances are it was, is that right?

A. We assume so until we can make a proper investigation and estimate of it.

(Witness excused.)

WARD H. FISHER was thereupon called as a witness on behalf of the defendant and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. State your name.

A. Ward H. Fisher.

Q. Were you subpœnaed here as a witness for the plaintiff?

A. Yes, sir.

Q. What is your business?

A. I am a contractor and engineer.

Q. Was that your business in 1925, also?

A. Yes, sir.

[fol. 306] Q. Were you acquainted in any way with the school building involved in this case, school district 98 of Payne County, Oklahoma?

A. Yes, sir, somewhat.

Q. Just tell the jury in a general way what your acquaintance with that property consisted of and your knowledge of it.

A. I was employed by the Board of Education of that district to render engineering advice in regard to the construction of the addition to the old building, and after having been engaged in that capacity was later employed to supervise the construction in an advisory capacity.

Q. And did you supervise the construction?

A. Yes, sir.

Q. Now, that was the construction of the new part of the building, was it, Mr. Fisher?

A. Yes, sir, and some work on the old building.

Q. That, as I understand it, included remodeling in a way, the old building, that is, changing the roof and the roof supports and stairways and cutting out a wall, or part of the wall at least, of the old building, didn't it?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibits 9 to 13, and ask you to state if you know what those are.

A. Those are drawings made for the school board suggesting means of construction [constructing] the new addition in such a way as to obtain the results that they wished to obtain, that being for clear spans on the first floor, and the second floor divided up in class rooms; merely an engineering problem.

Q. Now, I hand you Exhibit No. 14, and ask you to state if you know what that is.

A. That is an outline specification made for the Board of Education at a later date as a suggestion to them for the carrying out of that work.

Q. Now, did you at that time notice and learn the method of construction, the general outline and general details rather of the old building which was already there?

A. I obtained a pretty fair idea of the details, yes, sir.

Q. Now, Mr. Fisher, do you remember the occasion of this building, both the old part and the new part, being destroyed by fire about the time it was destroyed?

A. Yes, sir.

[fol. 307] Q. Are you acquainted with Mr. Frank Cableman [Kebelman]?

A. Yes, sir.

Q. Do you know what his business is?

A. He is in the contracting business, building contractor.

Q. And he lives here in Oklahoma City, don't he?

A. Yes, sir.

Q. You knew him in 1925 and '26, did you not?

A. Yes, sir.

Q. Did Mr. Cableman [Kebelman] consult with you in any way with reference to making figures or preparing an

estimate as to the cost of replacing this building after it burned?

A. Yes, sir.

Q. Did you learn from him what the figures were?

A. Yes, sir.

Q. How much he figured it?

A. Yes, sir.

Q. Did you satisfy yourself as to whether or not the building could be replaced for the amount he figured?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial and hearsay.

By the Court: Yes, that would be hearsay.

Mr. Lee: Exception.

By Mr. Lee:

Q. Mr. Fisher, I will ask you whether or not you had any agreement with Mr. Cableman [Kebelman] about taking an interest with him in the rebuilding of this school building if he got the contract at the figures he submitted to you?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Sustained.

Mr. Lee: Exception.

By Mr. Lee:

Q. Do you know the average cost for the year 1926 of fire proof, direct heat school buildings in Oklahoma City, Oklahoma, per cubic foot?

A. Yes, sir.

Q. What was that cost?

Mr. Anderson: That is objected to as incompetent, irrelevant and immaterial and not the proper basis for proving the value of this building.

[fol. 308] By the Court: Sustained.

Mr. Lee: Exception.

By Mr. Lee:

Q. Do you know the cost per cubic foot of the content of the construction of buildings such as the building which

was destroyed and is in controversy in this case in January, 1926.

A. Not accurate cubic foot cost, no, sir.

Q. Do you know the approximate cubic foot cost?

A. Yes, sir.

Q. What was it?

A. From nine to fifteen cents per cubic foot.

Q. And can you take those plans and specifications, Plaintiff's Exhibits 9 to 13, and Plaintiff's Exhibit No. 14, together with your knowledge of this building as it was prior to the fire and determine the number of cubic feet content in that building?

A. Yes, sir.

Q. Will you do that, please, sir?

By the Court: What were the dimensions?

A. 54 by 35 feet, 5 as to plan and the height was approximately 36 feet. I would estimate on a cubic foot basis that the approximate cost would be about $35,000 for the—

Mr. Anderson: I move to exclude his answer as not being responsive to the question which was asked. He was asked how many cubic feet there were in that building.

By the Court: You can explain your answer.

By Mr. Lee:

Q. Give us the number of cubic feet, please, in the building.

A. I would estimate in that building about 35,000, between 35,000 and 40,000 cubic feet.

By the Court:

Q. How do you get that?

A. Due to the fact that part of the work, part of the building is included in the old building, and the figures on that addition over-lap that work done in the old builing, and on the old building.

By the Court:

Q. You are estimating on the basis of cubic feet, 69,000 cubic feet in that building according to your figures aren't there?

A. There would be figures for the height, the actual height, but in figuring the cubic content of that building for an estimate, I would not use the actual height due to the [fol. 309] fact that there are no partitions in the first support but would use instead a height of approximately 20 feet, 20 or 22 feet. I would reduce, in other words, my cubic foot price by reducing the volume. The practice of estimating the cost of buildings on a cubic foot basis is extremely hazardous.

By Mr. Lee:

Q. From your knowledge of that building at the time it was destroyed by fire in January of 1926, state whether or not in your opinion that building could have been replaced at that time with materials of like kind and character as those of which it had been constructed for the sum of $56,000?

A. I don't know whether it could or not.

Q. Did you ever figure it out to see?

A. I never figured it myself, no, sir.

By the Court:

Q. On the face of the 69,000 cubic feet at 15 cents a cubic foot that would only amount to $10,350, wouldn't it?

A. $103,000, wouldn't it?

By the Court: That would be $1.50 a foot, 69,000 cubic feet would be only $10,350.

Mr. Lee: I wish you would check your figures, Mr. Fisher, and see whether or not you have made any error in your calculation.

A. The error of my statement exists in the cost per cubic foot of such a building. Ordinarily, school buildings do cost from 9 to 15 cents per cubic foot, but I know from these figures that call for 75,600 cubic feet, that the height of 40 feet would evidently be an error because I know some of the elements of cost. On a basis of 10 cents per cubic foot it would only cost $7,560, and I know that the building cost more than that, which is a very good illustration of the fact that the cubic foot cost cannot be taken as a basis of value in any case.

By Mr. Lee:

Q. You have figured for only the addition to the building?
A. Yes, sir.
Q. I wish you would figure the whole building.
A. I am unable to do that because I don't know what would be a fair cubic foot value for the entire structure.
Q. That is the old part of the structure?
A. Yes, sir.
Q. Do you know the dimensions of the old part of the structure?
[fol. 310] A. Approximately.
Q. You didn't have anything to do with building the new building they built up there after this fire?
A. No, sir.

By the Court:

Q. Do you know the actual cost or approximate cost of building the construction of which you superintended?
A. No, sir, I do not.
Q. Do you remember your estimate on it?
A. I never made an estimate on it. That is, of the cost of the new building. I made an estimate, as I remember, on the cost of the entire amount of work which was done, including replacing of the old roof, and other work on the stage and stairways and so forth.
Q. What was year estimate on that?
A. As I remember, it was $32,000 or $34,000; labor and material.
Q. It wasn't $58,000?
A. No, sir.

(Witness excused.)

Guy H. Fuller was thereupon recalled as a witness on behalf of the defendants and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. State your name.
A. Guy H. Fuller.

Q. Where do you live?

A. 1141 West 34th Street, Oklahoma City.

Q. What is your business?

A. Insurance adjustments.

Q. You are the same Guy H. Fuller who testified on behalf of the plaintiffs in this case?

A. Yes, sir.

Q. How long have you been engaged in the insurance business?

A. In different branches of it about 32 years.

Q. What different branches have you been in?

A. Well, originally I was what they termed a local agent. I was afterwards then an employee in the home office of an insurance company, and then became what they term a state [fol. 311] or special agent in Oklahoma in 1903, and then became an adjuster solely in 1920.

Q. Since 1920 have you been engaged constantly in the adjusting business?

A. Yes, sir.

Q. Are you employed by any particular companies?

A. No, sir.

Q. What kind of an adjuster are you known as?

A. Known as an independent adjuster working for whoever wishes to hire our services.

Q. Mr. Fuller, upon what basis are you hired and how are you paid for your services, you and your men?

A. For the time we put in on the investigation and handling of the claim.

Q. Is that true in each case?

A. Yes, sir.

Q. Now, I believe you testified on behalf of the plaintiff that you were designated or hired as an adjuster for the defendant National Fire Insurance Company of Hartford, Connecticut/ [Connecticut] in connection with the loss involved in this case?

A. Yes, sir.

Q. And I believe you testified that you made a trip to the scene of this loss?

A. Yes, sir.

Q. When did you make your first trip there?

A. I would say approximately somewhere around the 10th of January. I would not be exact about it.

Q. And then were you back there after that, later?

A. Yes, sir.

Q. About when was that?

A. The latter part of February.

Q. At the time you were there about the 10th of January, did you have any conversation with any members of the school board of the plaintiff in this case?

A. Yes, sir.

Q. With whom did you have a conversation?

A. With Mr. Langston, as I recall it, the clerk.

Q. I wish you would go ahead and tell the jury the best you can, if you don't remember the exact words, please give the substance of the conversation between you and Mr. Langston at that time.

A. After going to Yale, we drove to the scene of the fire, [fol. 312] the school house, and then drove down to the place where Mr. Langston was employed, and a general discussion of the claims, the loss was had, and at that time we asked as to the plans and specifications of the building, and what records, if any, they had of the furniture and fixtures that were in the building. Mr. Langston's statement was that the items of that character had been destroyed in the burning of the building. We asked him to procure for us, if he could, from the county treasurer and county superintendent, a list of the furniture and fixtures contained in the building, and asked him also to procure or tell us where they could be procured, a copy of the plans and specifications, and our statement being that we would take these plans and specifications and have an estimate and detail made of the replacement cost of the property. At the same time we suggested to him, Mr. Kline was with me, is the reason I say we, we suggested to him that in order to verify the correctness of such figures as we might procure, it would be in order or be well for the board to have an estimate also prepared for their use. That, as I recall it, is about the contents of the discussion had at the time of the first meeting.

Q. Now later on did you receive any figures or plans and specifications?

A. After leaving Mr. Langston, Mr. Kline and I went back to Yale, and as I recall it now, through Mr. Hitt we obtained the plans which were introduced here, and that was all we got at that time, was merely the plans.

Q. Well, what did those plans cover?

A. They covered the addition with certain information as to the old building designating how it should be remodeled or repaired.

Q. Now, did you later on obtain any further plans or specifications?

A. Yes, sir.

Q. What did you obtain?

A. We obtained the specifications after I had written Mr. Langston asking him either to procure for us the original specifications or designating someone to with whom we could co-operate that would give us the necessary information to enable us to make a correct estimate. These plans, as I recall it, were sent from Ward H. Fisher, an architect, to Mr. Langston, and he forwarded them to me.

Q. Those specifications which you received at that time, to what did they relate or what did they cover?

A. They referred particularly to the addition to be built [fol. 313] to the school house with certain information pertaining to the changes and alterations to be made in the old building.

Q. Now, did the plaintiff in this case at any time ever furnish the plans and specifications for the old part of the building?

A. No, sir.

Q. Did they ever furnish you any figures to show the sound value of the building?

A. No, sir.

Q. Did they ever furnish you any figures showing what they claimed the sound value to be?

A. No, sir.

Q. Now, you say you had another meeting there the latter part of February, 1926?

A. Yes, sir.

Q. Was that a meeting between the school board and you men?

A. Yes, sir.

Q. If you remember, please state who was present at that meeting.

A. The school board composed of Mr. Langston, Mr. Quigley and Mr. Edge, and the superintendent of the school, Mr. Perswell, I think his name is, and Mr. George W. Kline, Lloyd Mullen and Frank Cableman [Kebelman] and my-

self; Mr. Mullen, Mr. Kline and myself representing the insurance companies.

Q. Do you know how Frank Cableman [Kebelman] happened to be there?

A. Yes, sir.

Q. Who is Frank Cableman [Kebelman]?

A. He is a contractor in Oklahoma City.

Q. Had you had any conversation or transaction with him with reference to this school house before this conference in the latter part of February, 1926?

A. I had.

Q. What was the nature of that transaction?

A. I asked Mr. Cableman [Kebelman] after I had received these plans and specifications to take them and go to Norfolk and discuss with the members of the board or such other parties as he could find, as to the character of the construction of that building, the older portion of it particularly, and make an examiantion and determine as near as possible from the debris as to how the building had been [fol. 314] built and to prepare for our use a detailed estimate on the basis of the actual reconstruction cost of that building.

Q. Did he do that?

A. He did so.

Q. When did you first see his figures?

A. In the teacherage at Norfolk.

Q. Was that at the same time you held this conference with the school board?

A. It was.

Q. Now, do you know how Mr. Cableman [Kebelman] happened to be there at the meeting?

A. As I recall it now, we had so many of them, we were holding a fire prevention meeting at Drumright, and either my office or Mr. Cableman [Kebelman] called me and told me that he had finished his figures, and we therefore made arrangements by 'phone to meet as soon as this meeting was over with, to drive to Norfolk, and to meet the board and to consider the proposition.

Q. So anyhow Mr. Cableman]Kebelman] was there at that meeting with his figures?

A. Yes, sir.

Q. Now, do you know whether or not at that time Mr. Cableman [Kebelman] was a responsible contractor and

capable of carrying out a contract to build a building? Of this kind?

A. I do.

Q. Was he?

A. He was.

Q. Do you remember approximately what his figures were on the replacement cost of this building?

A. I do.

Q. What were they?

A. $53,360 exclusive of the permanent fixtures.

Q. Do you remember about what the figures were on the permanent fixtures? And movable fixtures?

A. If I can refresh my memory from this—the permanent fixtures we figured a sound value of $1,717.76, and the movable furniture and fixtures, I don't recall now, but it was something in excess of $4,000.

Q. The value of the movable furniture and fixtures, was or was that not in excess of the amount of insurance?

A. It was in excess of the amount of insurance.

Q. On that item?

[fol. 315] A. On that item, yes, sir.

Q. Do you remember whether or not Mr. Cableman [Kebelman] had a contract relating to this matter or an agreement?

A. With me, you mean?

Q. Yes.

A. Yes, sir.

Q. What was that agreement?

A. The agreement was that Mr. Cableman [Kebelman] was to make the estimate on the basis of the actual replacement, and endeavor to obtain the job of reconstructing the building. If he obtained such job we did not pay him anything for his services. If, however, he did not get the contract we paid him for the time necessary to prepare the estimate and expenses incident to this work.

Q. Did the school board at this meeting you had the latter part of February, make any demand upon you or Mr. Kline or Mr. Mullen or all of you for any specific amount under those policies?

A. No, sir.

Q. Did they submit to you either then or at any other time any figures showing the amount they claimed to be the sound value of this property?

A. No, sir.

Q. Did you submit to them what you adjusters claimed or thought was the sound value of this property?

A. We did.

Q. What did you say to them at that time with reference to the sound value, loss and damage on this property?

A. Based on the reconstruction cost of $53,360, and with the allowance for depreciation as we figured it with the addition of the permanent fixtures, we figured the sound value of the building proper to be $52,409.76.

Q. And then what did you figure the amount of loss and damage covered by the policies was on the movable furniture and fixtures?

A. The amount of insurance on the movable furniture and fixtures was $3399.99, and the amount of loss and damage being in excess of that, that would be the limit of the companies' liability.

Q. In other words, that was $3399.99. Did you say anything to the members of the board about what you had figured the total amount on the building and the permanent furniture and fixtures and movable furniture and fixtures?

[fol. 316] A. Yes, sir.

Q. And what amount did you tell them you had figured?

A. $55,809.75.

By the Court: What was that amount?

A. $55,809.75.

By Mr. Lee:

Q. Did you say anything to them at that time about the proof of loss?

A. Yes, sir.

Q. What?

A. I submitted this sheet with the figures on to them, and made the statement if it was agreeable with them we would be willing to prepare proofs on that basis and submit it to the interested companies.

Q. By preparing proofs what do you mean?

A. Really reducing any agreement made to writing for transmittal to the company issuing the insurance policies.

Q. And what is contained in those proofs?

A. The provisions as set forth in the standard fire insur-

ance policy to be observed and complied with by the assured in case of loss. Do you want me to give the details?

Q. Just in a general way.

A. Principally being the company to whom it is to be submitted, the time and date of the fire, the description of the property insured, the amount of insurance named in this particular company, the total amount of insurance on the property and the total amount of the claim as made under that policy, with a statement as to the use and occupancy of the property, the incumbrances, if any, thereon, and the jurat setting forth the fact that they are in no way interested in the origin of the fire and the occurrence of the same.

Q. Is that proof of loss signed by anybody?

A. It must be signed by the companies named in the policy as principals and be sworn to by them.

Q. Now, in other words, if I understand you, what you told them you would do would be to write up this proof of loss for them to execute?

A. If these figures were satisfactory to them, yes sir.

Q. Now, if the figures were not satisfactory to them, could you or could you not prepare the proof of loss for them?

A. I might, but I wouldn't hold my job very long if I did.

[fol. 317] Q. How could you prepare the proof of loss if you didn't even know the amount they claimed?

A. We could not.

Q. In those forms of proof of loss which you use when you agree with the assured upon the amount of loss and damage and sound value, is there any place there in which the value of the property must be stated?

A. In the statement of the loss on the back it must set forth the value of the property, and the loss and damage as determined.

Q. And is there a place there for depreciation?

A. There is no specific item set out on the proof, but there is in the statement which is attached to the proof.

Q. And in a general way and then this proof of loss which you say you told them you would prepare, if these figures met with their approval, the information required by the policy in its provision relating to the furnishing of a sworn statement would have been included?

A. Yes, sir.

Q. In other words, if I understand you correctly, you would have a regular prepared form to make this proof of loss or sworn statement upon?

A. Yes, sir.

Q. For your convenience in the event you agree, and for the convenience of the insured in the event you agree on the amount or sound value and loss.

A. Yes, sir.

Q. Now, is that or is it not the only form of proof of loss that you have?

A. Yes, sir.

Q. Now, Mr. Fuller, I believe you stated you have been in the adjusting business for some eight or nine years.

A. I have been adjusting losses for twenty-five years. I adjusted losses when I was state agent. I have been particularly the last eight or nine years.

Q. In that time have you had any considerable amount of experience in determining and ascertaining and learning the price of building material of various kinds, and the cost of construction of buildings such as the one involved in this case?

A. I have.

Q. Do you have an opinion based upon that experience as to what it would cost to replace this building at the time of the fire complained of in this case?

[fol. 318] A. I have.

Q. And in your opinion what would it have cost?

A. Approximately $50,000.

Q. You mean that would cover just the building?

A. Yes, $50,000 to $55,000, approximation between the two; cover the building proper.

Q. Now, do you know whether or do you have an opinion as to whether the cost price of replacing this building would have exceeded the figures furnished by Mr. Cableman [Kebelman]?

A. I don't think so.

By the Court:

Q. Did you have the necessary information in your possession to enable you to make an estimate of the value of this building?

A. I had what plans and specifications they had, and could figure the cubic content of it, and knew the general construction of it from our inspections, and basing it on the cost of similar character of buildings, of that size, is what I based my estimate on.

By the Court:

Q. Is it customary to reach a conclusion in that manner when the plans and specifications are not available?

A. You mean any agreement, to reach a conclusion?

Q. Yes.

A. Oh, yes, we have to reconstruct from the ashes often times, without plans and specifications, and from outside information.

By Mr. Lee:

Q. Do you know whether or not this school board, the plaintiff in this case, ever communicated with you with reference to this loss after the conference you have described in the latter part of February, 1926?

A. Never heard from them after that.

Q. Did you ever write to them after that?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit 8, and ask you to state whether or not you wrote that letter to the plaintiff school board?

A. I did.

Q. And you say you never heard from them from the time of the conference on?

A. No, sir.

Q. Did you ever get a reply to that letter?

A. No, sir.

[fol. 319] Q. Now, at the time you were in this conference and you submitted these figures to the school board, the plaintiff, as being your estimate or the estimates of you three adjusters as to the replacement cost of this property, what did the school board do or say?

A. You mean after I submitted these figures?

Q. Yes.

A. As I recall it, they went out on the porch and consulted a while and came back in and said that they could

not accept the figures, and they made the further statement that they had an attorney who told them they could collect the full amount for a fee of $2500 and they were going to proceed on that line. I think then is when I told them to be sure and get a good attorney. That is the way I remember it, and then I also stated to them that under those conditions we could only call their attention to the provisions set forth in the policy contract which they held, and that as representative of the companies expected to stand on those provisions and stipulations as contained therein.

Q. And what happened then?

A. Well, I think you would say that was where the meeting broke up. We all got up and went different ways. That was the end of the conference.

Q. Now, do you remember what part Mr. Cableman [Kebelman] took in that conference, what he said?

A. As I recall it now, when we first got there we worked on the movable and permanent furniture and fixtures, and got them segregated, and after that was done, I asked Mr. Cableman [Kebelman] if he had his figures ready on the building, and he gave them to me, and then I made this statement, and in submitting the statement to them told them that my estimate of replacement value was based on the figures made by Mr. Cableman [Kebelman]; that he was a competent contractor, and that he was willing and ready at that time to give bond to replace the building for that amount of money. Later in the conversation, as I recall it, Mr. Cableman [Kebelman] stated that he was willing to take the contract and replace the building with material of like kind and quantity for the amount of money as set forth in his estimate. The school board, therefore, to stand the depreciation as figured, and that he was ready and willing to give the board a bond with any bonding company doing business in the state of Oklahoma to secure the fulfillment and carrying out of his contract.

Q. And what did the school board say to that?

[fol. 320] A. Well, I don't know that they said much of anything. About all they said about the values was what I told you awhile ago. They went out and conferred and came back in and that was the end of it. This took place before they went out to hold their conference.

Q. And what did they say when they came back in?

A. They had an attorney that told them they could collect all the insurance for a certain fee, and that is what they were going to do.

(Hereupon the jury was given the usual admonition by the Court, the court adjourned until January 16, 1929, at 9:30 o'clock A. M., at which time court reconvened, and all parties being present as heretofore, the trial of the above entitled and numbered cause was resumed and further proceedings had therein as follows, to-wit:)

Proceedings, 9:30 O'clock A. M. January 16, 1928

GUY H. FULLER was thereupon recalled and, having been previously sworn, further testified as follows:

Cross-examination.

By Mr. Anderson:

Q. Mr. Fuller, I show you Plaintiff's Exhibit 4 and ask you if you signed that letter.

A. Yes, sir.

Q. And I show you Plaintiff's Exhibit 6, and ask you if you signed that.

A. Signed that with my stamp in the office. I didn't sign it personally.

Q. But it went out of your office?

A. It went out of my office.

Q. You dictated it?

A. Dictated the letter.

Q. I show you Plaintiff's Exhibit 8, and ask you if you signed that.

A. Yes, sir.

Q. Now, you say that this proof of loss you were going to take and submit was the proof of loss provided for in the policy?

A. I said the proof of loss which we were going to take is in accordance with the condition provided in the policy to be performed by the assured in case of loss, strictly in accordance with those provisions.

[fol. 321] Q. And has to furnish in that regard that the policy provides for?

A. Yes, sir.

Q. One of those I believe you said was to furnish a sworn statement and to show that the insured was not interested in the burning of the property?

A. That is the statement at the bottom of the proof.

Q. Of course, you are satisfied that the insured in this instance was not interested in the burning of the building?

A. We never raise- that question.

Q. And you don't have any suspicion that they did?

A. No, sir.

Q. One of the provisions I believe you mentioned that was to be disclosed by that proof was the amount of incumbrance upon the building or property?

A. Yes, sir.

Q. This being a public building, one belonging to a school district, you knew that there would not be any incumbrance on that building, didn't you, or property?

A. Strictly in the sense of incumbrance, no, there would not be any.

Q. You say that this building could be rebuilt in your judgment for around $50,000?

A. From $50,000 to $55,000.

Q. Why didn't the company rebuild it?

A. There are several reasons why it wasn't rebuilt. In the first place——

Q. Not generally; but why didn't you rebuild this one or have it done?

A. The first reason would be this: If we could not agree with them on the sound value of the property it would be an impossibility to ever satisfy them by the reconstruction of the property. That is the first reason. Another reason was this: That I had authority to speak for but one company only and a minor portion of the insurance, and another thing, the companies do not have the facilities or time or opportunity to supervise the reconstruction of any building.

Q. What is the purpose of the provision in your policy reserving the right to rebuild?

A. It is an option that has grown up in the standard policy and has developed over the years, and there is no

particular reason that I have ever known. I have never used it in over twenty-five years of adjusting losses. It is optional and not manditory [mandatory].

[fol. 322] Q. Do you mean to say the insurance companies never rebuild?

A. I know of no case in my personal knowledge where the insurance company has ever reconstructed a piece of property.

Q. I will ask you if you didn't say to the members of the school board at the time of this meeting on February 27, that Mr. Cableman [Kebelman], whom you had there as a contractor, had made an estimate upon rebuilding the building for one of the insurance companies you represented at that time in Oklahoma City?

A. No, sir, I never did. I may have made that statement, that Mr. Cableman [Kebelman] was building or reconstructing a building in Oklahoma City that has been damaged by fire for the man that owned the building, and that he had made the estimate on which the loss was settled for me, but that he was not and never has rebuilt for an insurance company to my knowledge any building whatever.

Q. I will ask you if you didn't state in addition to what you say you probably said, that he was rebuilding it for the insurance company, or companies, because you could not agree with the owner as to the value?

A. No, sir, because those are not the facts.

Q. That is not the fact?

A. No, sir, I made no such statement.

Q. You give it as your own judgment that this building could have been reconstructed for about $50,000?

A. From $50,000 to $55,000.

Q. You say one of the reasons that you didn't rebuild was because there were other companies that were interested?

A. Yes, sir.

Q. In this loss?

A. Yes, sir.

Q. Did you discuss with these other adjusters the question of rebuilding this property?

A. No, sir.

Q. It wasn't even mentioned between you, was it?

A. No, sir, not that I remember.

Q. It was never considered, was it?

A. No, sir.

Q. You never had any intention of rebuilding?

A. No, sir.

Q. How many rooms were there in the building?

[fol. 323] A. Oh, I couldn't tell you off hand now. I would have to check it over. That has been over three years ago since I bought it or went over the plans.

Q. What was the size of it?

A. As I remember it, 56 by 102, over-all.

Q. Did you ever see the building?

A. Just the ruins of it.

Q. That was part of the walls?

A. Yes. I have a recollection of having seen the old building going by it there in years gone by.

Q. How long before this insurance was written?

A. Oh, I don't know. I have been traveling over this state for 25 years, and naturally would see that building driving down that way or on the train, but to know it, I didn't know it.

Q. Do you have any independent recollection of having seen that building?

A. Yes, I think I have, the old part of the building at least.

Q. Can you tell approximately when you ever saw it?

A. It has been four or five or six years ago; something like that.

Q. Did you have any plans or specifications covering the old part of the building?

A. No, sir, except what information pertaining to the old as is shown in the plans and specifications for the new building, designated what shall be done in a measure with the old building.

Q. And these plans and specifications that were furnished you covering the addition were sufficient for you to determine the replacement value of the old building, was it?

A. Not entirely.

Q. Then, how are you able to tell this jury how much it would cost to rebuild that building?

A. By actual inspection of the premises of the debris that was there, and the character of the construction, as could be determined from that long [along] with the information given in the plans.

Q. From the specifications and plans you had on the addition?

A. Yes, sir.

Q. And from going out there and viewing the ruins as to that addition from the old building, the original build-
[fol. 324] ing you could determine what it would cost to build the entire building?

A. Together with such information we could get from other parties of the construction.

Q. What other parties did you get information from?

A. Well, we talked to the school board as to how it had been built, and I think we talked to some of the agents there.

Q. And when you met with the school board you were satisfied as to what it would cost to rebuild it?

A. I don't know whether I made any definite figures at that time or not.

Q. You didn't have any doubt about your figures on what it would cost to replace it, did you?

A. I didn't have any doubt on the figures that we used at that conference.

Q. That is what I mean. Now, Mr. Cableman [Kebelman] had nothing except these plans and specifications as to the addition, and whatever information he could pick up, did he?

A. And a personal visit to the scene of the fire itself.

Q. And his proposal or his figures was for that figure he would build a building back just like the one that had been destroyed?

A. Exactly.

Q. You say Mr. Cableman [Kebelman] went up there with the idea of getting a contract to rebuild it?

A. That is my understanding.

Q. And you went up there with the purpose of settling it for just as little money as possible?

A. No, sir, that is not correct.

Q. You didn't go up there with any intention of paying the amount of this insurance, did you?

A. I went up there with the intention of paying the sound value of that building; nothing else.

Q. You were satisfied it wasn't anything like the amount of this insurance?

A. I was satisfied it was over-insured, yes, sir.

Q. As a matter of fact, it is part of your duties as an adjuster to settle a loss for less than the amount of the insurance, if possible, isn't it?

A. It is not.

Q. What is your purpose then?

A. My purpose in handling a loss, and the instructions [fol. 325] under which I operate is to see that we pay to the assured every dollar that is coming to him on the basis of sound value of the property.

Q. And you look after his interests and see that he gets every dollar?

A. Yes, sir, that is my instructions.

Q. You say you had sufficient information to make out this proof of loss you speak of and submit to these companies?

A. I don't get your question.

Q. (To the reporter:) Read the question.

(Thereupon the last previous question was read by the reporter.)

A. I had sufficient information as to what I deemed sound value and if it had been agreeable with them would have submitted the proof.

Q. And that was from the information you had up to the time of this meeting in the latter part of February?

A. Part of it was obtained at that meeting.

Q. I understand, but at the time of these negotiations for a settlement you expected to base this proof of loss on the information you then had?

A. Yes, sir.

Q. You stated on yesterday that you didn't take this proof of loss unless you could agree with the insured on the value?

A. That is correct.

Q. I believe you further stated if you would make out a proof of loss for the insured and submit it to the company, unless the insured had agreed with you on your figures you would lose your job, is that right?

A. No, that wasn't the meaning of that at all.

Q. What was it?

A. You asked me if I could make out a proof of loss on that basis—in other words, if I could execute a proof of loss that we didn't approve of. That was the meaning of your question; that I could not do.

Q. Did you ever make out a proof of loss and submit it in the interest of the insured unless he agreed to your figures?

A. Unless we had an agreement between ourselves, no, I never did. That precedes the making of a proof by us, and an agreed settlement.

Q. If you reach an agreement then, that of course, alone settles it, doesn't it, unless somebody, some higher authority than you turns it down?

[fol. 326] A. Yes, sir. Then as a courtesy to the assured we prepare the proof. It is his proof, not ours.

Q. But you don't prepare any for him as a matter of courtesy or otherwise unless he agrees with you, do you?

A. No, sir.

Q. You don't even take the things he has furnished you and fill that out in the form of a proof of loss and send it in for the consideration of the company?

A. No, sir. That is his duty under the policy contract to do that himself.

Q. And you don't even mention it to him, do you, unless he agrees with you?

A. Yes, sir, as I did to the school board, I called their attention to that provision of the contract and always do that.

Q. I will ask you if when you were on the stand yesterday afternoon if you didn't say that when you failed to agree with this board that you said to them in general terms, "We stand on the provisions of this policy", without ever mentioning the provisions specifically as to the proof of loss?

A. I probably didn't call their attention specifically to the proof of loss. I called attention to the conditions of the contract pertaining to the loss.

Q. You never said to that board at any time during your discussions, "You haven't filed a proof of loss in accordance with this policy", did you?

A. No, sir.

Q. And you never at any time said to that board, "You are required to file this proof within 60 days," did you?

A. No, sir. It was their policy.

Q. And you knew when you were at that meeting and tried to settle them it was within three to six days of the time that would expire, didn't you?

A. I don't think I ever gave it any consideration.

Q. You knew when the fire occurred?

A. Yes, sir.

Q. You were at that meeting with them on the 27th of February?

A. Yes, sir.

Q. You knew the time would expire shortly, didn't you?

A. I don't suppose I gave it any consideration. I went there in an endeavor to close the claim on a right basis.

Q. I believe you stated on yesterday they never told you how much they wanted?

[fol. 327] A. No, sir. They never submitted to me any figures other than what they said about the attorney telling them they could collect it all. That is the only indication of what they ever wanted that was made.

Q. They didn't say what they wanted, but they told you they had employed a lawyer and was going to pay him $2500 to collect it all?

A. No, I didn't say that. I didn't say they employed a lawyer. They told us a lawyer that for $2500 told them he could collect the full amount of the insurance.

Q. And that is what they were going to do?

A. Yes, sir.

Q. And yet you didn't know how much they wanted?

A. I knew they wanted that but to their idea of value they never did tell us what it was.

Q. You did know they wanted all of this insurance?

A. Sure, I knew that.

Q. Provided in the policy, didn't you; you did know they were insisting that was the value of the property destroyed, didn't you?

A. No, sir.

Q. There wasn't any lawyer at that meeting representing this board, was there?

A. Not that I know of, or us either.

Q. And that board never left the premises from the time you got there until you left, did they?

A. No, sir.

Q. Do you mean to tell this jury that board had employed a lawyer?

A. I didn't say they employed a lawyer.

Q. Do you mean to tell this jury that board told you they had retained a lawyer?

A. No, sir, I never said that.

Q. Or that there was a lawyer?

A. I never said that.

Q. Tell me what you did say.

A. They said to us they had a lawyer who told them that for $2500 he would collect the full amount of the insurance. That don't mean I said they had employed a lawyer or anything of that kind. I am simply repeating the statement they made to us.

Q. Which one said that?

A. Mr. Quigley, as I recall it.

[fol. 328] Q. You mean to tell this jury he made that statement to you at that meeting at the particular time and only time you ever made them any offer for settlement?

A. That is exactly what I mean to say.

Q. If that statement was correct he had discussed it, or the board had with this lawyer before you had ever intimated what you would do?

A. You would naturally presume that, yes.

Q. Mr. Fuller, the amount that Mr. Cableman [Kebelman] was going to charge this board for rebuilding this building was more than you were going to pay the district, wasn't it?

A. The depreciation would be the only deduction from his figures of replacement cost.

Q. Now, did Mr. Cableman [Kebelman] submit to the board any plans or specifications as to what he was going to build?

A. Nothing more than the statement that he would rebuild or reconstruct the building of like quality of material and workmanship for the amount set forth in the estimate.

Q. And you were satisfied he could do that without the plans and specifications as to what it was he had to rebuild?

A. Yes, sir, from the information that we had.

The board did ask you to rebuild it, didn't it?

A. I don't recall any statement of that kind at all. There was no serious consideration at least ever given to it. It never was seriously proposed that I know of.

Q. I will ask you if the board didn't say to you that if you would rebuild this building that the board would be satisfied.

A. I have no recollection of that at all.

Q. Would you say they didn't tell you that?

A. I wouldn't say positively they didn't, but I say I have no recollection of them ever making any such a statement. I will say this much, that even if they did say it, it wouldn't make any serious impression with me because I knew we wouldn't do it.

Q. You never intended to?

A. No, I frankly admit that.

Redirect examination.

By Mr. Lee:

Q. I believe you stated that in your years of experience in the insurance business you never had rebuilt a piece of property for an assured.

[fol. 329] A. No, sir.

Q. Now, on the question of a lawyer being present at that meeting, Mr. Perswell was present during that meeting, wasn't he?

A. Yes, sir.

Q. Did you know at that time that he was a lawyer?

A. No, sir, I didn't.

By the Court: I don't think there is any evidence he was a lawyer.

Mr. Lee: He testified he was admitted to the Bar in 1914.

By the Court: Well, there is a distinction, you know. One could be admitted to the Bar and not be a lawyer.

Mr. Lee: Frankly, the distinction is too fine for me to comprehend.

By Mr. Lee:

Q. Will you tell the jury what your instructions were with reference to this loss as to what amount you should

agree upon with the school board as to the sound value of this property?

A. You mean my instructions from the company?

Q. Yes, sir.

A. My instructions from not only this company but every other company I represent was that it is my duty to ascertain first the actual sound value of the property, and the loss and damage on that property and then endeavor to make a settlement on that basis. In other words, if I can put it a little clearer, when I go out on a loss I am not representing the company any more than I am representing the assured. I am an adjuster in the strictest sense of the word that goes between the two, to adjust the differences, and it is as much my duty to see that an assured receives every cent that is coming to him as it is my duty to see that the assured is not over paid, and the company that I represent would criticise me more for taking a hundred dollars away from an assured than it would for over paying him a thousand dollars. Now that is the basis on which we transact our business.

Q. Have you ever paid an assured more than the assured claimed?

A. I have in many and many a case checked an assured's estimate on a building and found errors that were against him. We always correct those errors the same as if they were the other way. In handling a set of books the first think we do is to check those records for their correctness, [fol. 330] and we correct any error regardless of how it goes, the only object we have in mind being to determine the correctness of the proposition and the actual value of the property destroyed and the loss and damage thereon.

Q. Were you instructed by the National Fire Insurance Company of Hartford, Connecticut [Connecticut], a defendant in this case, to attempt to agree with this school board on a valuation less than the actual property value?

A. No, sir.

Recross-examination.

By Mr. Anderson:

Q. Mr. Fuller, you say you were representing this school district just as much as you were the company?

A. As far as ascertaining the value is concerned, yes, sir. The only thing I had in mind was to find the actual value of that property.

Q. And you were the representative of both of these parties?

A. I was between the two.

Q. You were between them, and you are really serious about your statement, you were representing the board as much as the company?

A. I certainly am, as far as ascertaining the value.

Q. Who hired you?

A. The National Fire Insurance Company.

Q. Did this board ever hire you?

A. No, sir. The National Fire Insurance Company didn't hire me to rob the board either.

Q. Did you mean to say you tried to be fair and impartial?

A. I meant exactly what I said, that when I go on a case I endeavor to protect the boards' interests the same as the companies' interests to find out the actual value, and that is on what the company should pay that board or that assured, and I set my self independent of either party to ascertain that value.

Q. And you were just as zealous to protect this board as to other provisions of the policy in order to see that they got what they actually lost?

A. That is exactly what I was working for, was to find out how much they had lost.

Q. Then if you represented this board why didn't you send in their proof of loss?

[fol. 331] A. Now you are coming to a case where I have no authority.

Q. No authority?

A. No authority as far as the provisions of the contract are concerned, to waive or admit liability or deny liability. I have the right to investigate and determine the value and report.

Q. Why couldn't you have made out a proof of loss for this board?

A. Because that is not my business. We had not reached an agreement.

Q. That is it, they hadn't accepted your figures, had they?

A. No, sir. Disregarding the effort on my part to be fair and ascertain the value they refused to accept it. Then and there my duty was ended to them.

Q. Now then, if you were representing this board why didn't you say to them, "You ought to make out a form or proof of loss"?

A. That is not my business. I have no right to vary conditions of the policy or admit or deny liability.

Q. You knew they had not sent in a sworn proof?

A. Yes, sir, never have yet.

Q. And you never even called it to their attention?

A. No, sir.

Q. Yet you were representing them?

A. To the extent of ascertaining the value of their loss.

Q. And nothing else?

A. Loss and damage, yes, sir.

(Witness excused.)

LLOYD J. MULLEN was thereupon called as a witness on behalf of the defendant and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Thurman:

Q. Please state your name and residence.

A. Lloyd J. Mullen, Oklahoma City, Oklahoma.

Q. You are the same Mr. Mullen called to the witness stand by the plaintiff yesterday?

A. Yes, sir.

Q. You are the same Mullen who attended the conference [fol. 332] that has been referred to in the testimony as being held in the teacherage or building on the grounds of School District No. 98, of Payne County, on February 27, 1926?

A. Yes, sir.

Q. You did attend that conference?

A. Yes, sir.

Q. Up to the time of your reaching the place of that conference, had you obtained the figures prepared by Mr.

Cableman [Kebelman] on the replacement value of the building which was destroyed or damaged?

A. No, sir. I never seen the figures until we were in the meeting.

Q. Did you see those figures when you did appear at that meeting place?

A. Yes, sir. Mr. Cableman [Kebelman] had a rather heavy file there, as I recall it, and the papers were spread out and we checked and discussed them.

Q. You say "we" checked and discussed them. Who do you mean by "we"?

A. Mr. Fuller and Mr. Kline and myself were on one side of the table, as I recall it, it was a table we were sitting at, and the members of the board were on the other side.

Q. Was that the first thing that was done on that meeting obtaining those figures of Mr. Cableman [Kebelman] and discussing them?

A. Yes, after we had settled down into a formal session, so to speak. My recollection is that Mr. Fuller or someone asked Mr. Cableman [Kebelman] if he had his figures ready.

Q. Just a little louder, please.

A. I say, after we had sat down at the table there and had gotten into more or less of a formal conference, my recollection is that some one of us, possibly Mr. Fuller, asked Mr. Cableman [Kebelman] if he had his figures with him on the building.

Q. Was that when the figures were produced?

A. Yes, sir.

Q. State whether or not there was anything more than formal greeting, anything said by either you, Mr. Kline or Mr. Fuller to the members of the board, the three of you, Mr. Fuller, yourself and Mr. Kline examined and went over the figures of Mr. Cableman [Kabelman].

A. I don't recall of anything.

Q. Who of the three of you, yourself, Mr. Kline and [fol. 333] Mr. Fuller, made any statement to the members of the board after obtaining the figures from Mr. Cableman [Kebelman]?

A. Mr. Fuller.

Q. What did he say in substance?

A. After the figures had been turned over by Mr. Cableman [Kebelman], Mr. Fuller, I don't know who brought it up, I believe Mr. Fuller did, brought up the question of movable and permanent fixtures, and there was a discussion there with some of the members of the board with us as to what should go in as permanent fixtures and movable fixtures, and after that discussion Mr. Fuller, as I recall it, made the figures from Mr. Cableman's [Kebelman's] report. That is, he set them down on a paper, totals, and he inserted in that sheet the results of our discussion there of the items. That paper was handed or pushed across the table to the board with the statement as to what they showed, what the results were.

Q. You saw that paper, did you, that Mr. Fuller made the figures on?

A. Yes, sir, I saw him making the figures.

Q. I hand you a paper with figures on it and ask you to state whether or not you recognize that as the paper on which Mr. Fuller made the figures, and which was handed to some member of the board?

A. Yes, sir, that is the paper.

Q. And you saw Mr. Fuller make those figures there at that meeting?

A. I saw him make the figures, yes, sir.

Mr. Lee: I will ask that paper be identified as Defendant's Exhibit A, and offer in evidence Defendant's Exhibit A.

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Overruled. It is harmless, I think. All of the things contained in it have been introduced in evidence, I think.

(Thereupon Defendant's Exhibit A was received in evidence and is as follows:)

[fol. 334] DEFENDANT'S EXHIBIT "A"

(Pencil figures in original:)

5625.85 1232
1875.28

2750.57

Est. to reconstruct		$53360
Depr.		2668
	506.92	[50692]
Permanent fixtures per list:		
Chemical table	442.00	
Screen	100	
Cases	381	
Misc.	15.95	
"	19.05	
"	7.20	
	965.20	
154 Desks a 8.00	1232	
	2197.20	
Dept. 20%	479.44	
	1717.76	1,717.76
		$52,409.76
		3,399.99
		$55,809.75

By Mr. Thurman:

Q. I will ask you to state whether or not there was any other paper with figures on it prepared by Mr. Fuller and handed to the members of the board or any of them in that conference?

A. No, sir.

Q. Did Mr. Fuller make any statement to the members of the board at the time that he handed that paper to them?

A. Yes, he did.

Q. Just state to the court and jury what he said.

A. In substance, he handed the paper to them and advised them that these were the figures which represented, in our opinion, the amount of sound value, and the loss and [fol. 335] damage on this property that was involved, and that if the figures were satisfactory to the board and they would take proof of loss and submit it to the companies.

Q. What happened then?

A. The board, the members of it looked at the figures and glanced over them, and shortly afterward went out on the porch, and in a few moments came back in, and one of the members of the board made the remark after coming back in that they had a firm of attorneys that had guaranteed the full amount for $2500, and that as I recall it practically ended the formal discussion of it.

Q. State whether or not the conference then broke up or what happened.

A. Yes, the conference then broke up, and we all went out of the house, went in various directions. I had my car there and I think Mr. Fuller and Mr. Kline and Mr. Cableman [Kebelman] rode into Yale with me. I don't know what became of the balance of the parties.

Q. Did you have any further talks or negotiations or did you attempt any meetings of the board after that time?

A. Not after that date.

Q. Did you have any communications with them in any way after that time with reference to the amount of the loss?

A. No, I have never had any communication from them with reference to the loss or damage or claim of any character.

Cross-examination.

By Mr. Anderson:

Q. Were you also representing the school board?

A. No, sir.

Q. Not in any sense were you?

A. No, sir.

Q. What did you expect to have this school board sign that day, if they agreed with you?

A. Well, if they agreed on the loss and damage I anticipated they would sign a sworn proof of loss.

Q. And you made out a form, didn't you, for them to sign?

A. No, sir.

Q. Was that a form of a proof of loss which was passed around to the school board showing the amount they said was on some printed blank?

[fol. 336] A. There never was any form passed around in the nature of a proof of loss, no, sir.

Q. You yourself didn't know anything about the value of this building, did you?

A. Not of personal knowledge.

Q. You relied solely on what Mr. Cableman [Kebelman] told you, didn't you?

A. Together with our checking of his figures at Norfolk that day.

Q. Do you know how much this school board wanted in settlement?

A. I never was informed other than by the statement that they made, that this firm of attorneys on the payment of $2500 fee would guarantee and collect all of the insurance. That is the only intimation I ever had of what they may have wanted.

Q. If that statement was made you were satisfied they wanted the whole amount of the insurance, weren't you?

A. Oh, yes, sure.

Q. You never did understand they wanted anything else or would take anything less than the full amount of the insurance, did you?

A. Why, not after that statement was made, no, sir.

Q. Now, at the time you say they made this statement about what some lawyer would do in collecting it all, if that statement was made, it was made the only time and the first time you ever made any offer, wasn't it?

A. Well, there was never but one offer made.

Q. And you never yourself nor any of the other adjusters, so far as you know, ever discussed value with them until that time, did you?

A. I never have, no, sir.

Q. They told you that they felt like you ought to pay the full amount of the policy, didn't they, or in substance that?

A. Well, I presumed by the statement they made that is what they intimated.

Q. And they told you when you undertook to discount it fifteen or twenty thousand dollars it was entirely too much, didn't they, told you right at that meeting, didn't they?

A. Well, I don't recall that. They may have said it, but I don't recall.

Q. And they told you when you said it could be rebuilt for about $55,000 that if you would do that it would be perfectly satisfactory, didn't they, or that in substance?

[fol. 337] A. I didn't hear that statement, no, sir.

Q. You mean to say they didn't say anything to you about rebuilding?

A. Not in that conference.

Q. Did they when you were there?

A. Not in my presence.

Q. You never heard that statement?

A. Never heard it.

Q. Did you ever offer to rebuild it?

A. No, sir.

Q. You never even considered rebuilding it, did you?

A. No, sir.

Q. Since you had the right under your policy to rebuild it, and could not agree with the board on what the building was worth that had been destroyed, why didn't you rebuild it?

A. For various reasons why. Of course, that does not clearly lay within my authority. I would not have the authority to bind the company on a rebuilding project.

Q. No, but you could recommend to your company that they do it, couldn't you?

A. Well, it would not be a proper recommendation because the company is not in the contracting business.

Q. But they can contract with a contractor just like anybody else, can't they?

A. It is optional with them if they care to assume that, yes, sir.

Q. Suppose that the question of rebuilding comes up when you cannot agree with the insured as to the loss, doesn't that come through the adjuster that has tried to adjust the loss? Who else does the insured talk to about replacing his property?

A. Well, as a rule unless he goes over the adjusters heads he talks to the adjuster.

Q. He wouldn't know who to go to over the adjuster's head, would he, ordinarily?

A. Oh, yes.

Q. Who would he ordinarily go to?

A. Over the adjuster's head?

Q. Yes.

A. He would go to the director of the company.

Q. The director of the company?

A. Yes, sir.

[fol. 338] Q. Who is that in your company?

A. It would be the home office of the Concordia Fire Insurance Company.

Q. Where?

A. Milwaukee.

Q. Now, would he go to one of the members of the Board of Directors, is that what you mean?

A. Well, I am intimating he would comply with the terms of his policy, and he can get in contact with the company, and their executive management the same as we would get in contact with the board of any corporation.

Q. And is that the only way that the question of rebuilding could be considered?

A. No, I didn't mean to intimate that. I was trying to answer your question as to where he would go to if he went over my head.

Q. You don't mean to tell me the adjuster never considers the assured, or discusses with him the question of rebuilding when they cannot agree?

A. I never in my experience ever rebuilt a building for an insurance company.

Q. Maybe you have not, has your company ever rebuilt one to your knowledge?

A. Not to my knowledge, or any company I have ever represented.

Q. Do you know why they haven't?

A. Well, it is not practicable.

Q. Do you know why that provision is inserted in the policy giving them the right to do it if they cannot agree?

A. Well, that is a statutory provision.

Q. But one that they never use, is that what you meant to say?

A. I don't know of their ever having used it except on little repair jobs or something of that character.

Q. They do use it, though, do they?

A. They would simply maybe send a contractor out on a $10 or $15 small loss, usually through the agent and not through the adjuster and make the repairs as a courtesy and accommodation to the assured.

Q. Does the adjuster ever do that?

A. Have the repairs made?

Q. Yes.

[fol. 339] A. I presume with the consent of the assured that he will agree that the repairs shall be made, and to accommodate the assured if he has nobody he can get in touch with to do those repairs he will suggest perhaps we send out with him so and so, and he can consult with you on these repairs, and when he submits the bills to you, you let us have them and we will settle with you, we will take care of the bills. We don't pay any contractors even on small repair jobs, don't pay them there.

Q. When you go out as an adjuster on one of these losses you go out there for the purpose of determining the extent of the liability of your company, don't you?

A. Liability in respect perhaps to sound value, the amount of loss.

Q. Well, whatever you call it, sound value or whatever it is, that means what your company will pay?

A. I don't have any authority to determine the liability as far as the application or violations of any of the terms of the policy.

Q. I understand that, but whatever you call it, the final analysis of it is, how much does your company owe. Isn't that the answer to it?

A. No, I wouldn't say so without qualifying it.

Q. Tell this jury what else it means.

A. You mean my authority in going out, my action?

Q. Yes, if you reach an agreement tell this jury if it means anything other than what your company is to pay unless somebody of higher authority than you rejects it.

A. I will say it this way: That in the event, after we investigate a loss and find nothing irregular, and find no

policy violations, and everything is in order, then we are permitted under our authority to go ahead and determine the sound value and try to agree with the assured as to the amount of loss and damage, if there are no violations, and everything is in perfect order, and we do agree, why, it is presumable that that perhaps in dollars and cents is the liability of the company unless rejected by the higher authorities that we mentioned.

Q. Yes, and assuming there were no violations of the policy in this case and they ad [had] accepted your figures, that is what the company would have paid unless some higher authority than you rejected it?

A. Some higher authority rejected it.

Q. So when you talk about sound value you talk about what the company owes, don't you?

[fol. 340] A. No, sir, because the loss is not always equal to a sound value except in cases of total losses.

Q. The loss is not equal to the sound value?

A. Not except in the case of total loss. You might have a sound value of $50,000 and yet only have a partial loss.

Q. But if it is a total loss sound value represents what is to be paid?

A. Sound value and loss and damage is the same then.

Q. And when you determine sound value, even though there may not be a total loss, you determine the sound value of that which was lost, don't you, as a final conclusion?

A. Oh, yes, true.

Q. Then it does represent what is to be paid unless there is some other reason why it should not be paid?

A. But we don't refer on a partial loss as a loss having sound value because we have to determine the sound value of the whole property, if possible.

Q. And by some process you determine the sound value of that which was destroyed or damaged, don't you?

A. It would depend, of course, whether the nature of the article destroyed, whether it is a stock item. If it is a portion of a building it would simply be a play on words as to whether you would call it repairing or something else.

Q. It is simply a play on words and you are out there to see what your company is to pay?

A. Well, it is to determine what the loss and damage is.

Q. Did you find any violations of this policy?

A. I don't recall that I did, this far, up to the time of the loss.

Q. Did you ever ask this school board or any of its members for any information they didn't furnish?

A. Well, I never was furnished any information personally.

Q. It was furnished to Mr. Fuller, wasn't it?

A. Yes, sir.

Q. I believe you said on yesterday that Mr. Fuller was the spokesman for all three of you adjusters in that matter?

A. Yes, principally because of the fact that the work was centered or concentrated. It had to be concentrated with one individual in order to keep contact.

Q. You and Mr. Kline had your part of it centered in Mr. Fuller?

[fol. 341] A. In so far as the clearing house was concerned.

Q. And whatever Mr. Fuller did he was doing for all three of you, wasn't he?

A. In most instances.

Q. And Mr. Fuller hired Mr. Cableman [Kebelman] in the interest of all three of you, didn't he?

A. Yes, sir.

Q. Did you mean to have the board sign anything if you reached an agreement?

A. Certainly. We were going to suggest to them that they sign the proof of loss.

Q. Anything else?

A. No, sir.

Q. Didn't you expect that board to agree to settle with you in the event you agreed on a figure?

A. We presumed if we agreed on a figure that the proposition would be acceptable to them.

Q. Now do you mean to tell this jury that you were out there trying to bind the board and didn't expect to bind your own companies you represented if you reached an agreement?

A. The very proof of loss itself provides it is not binding on the company. It is their proof.

Q. Suppose they had made proof of loss, is that all you were out there to do, to take proof of loss?

A. No, sir.

Q. What else were you out there to do?

A. To determine and agree with them upon the amount of sound value of the loss and damage if we could.

Q. And the sum and substance of that was to agree with them as to what they would accept in settlem*tn* [settlement], was it?

A. Yes, if they agreed on those figures it would mean they were willing to accept that in settlement.

Q. Did you expect this board to enter into some agreement with you adjusters and you adjusters not bind the companies at all, is that what you mean, you were out there to reach an agreement with them on the amount of this loss?

A. Yes, sir.

Q. And what it should be settled for, weren't you?

A. Yes, sir.

(Witness excused.)

[fol. 342] P. E. Perswell was thereupon recalled by the defendants and, having been previously sworn, further testified as follows:

Recross-examination.

By Mr. Lee:

Q. You are the same Mr. Perswell who testified on behalf of the plaintiff in this case?

A. Yes, sir.

Q. I want to ask you a few questions with reference to the property there of the school board mentioned in the policies of insurance that was not destroyed by fire. Will you give the jury as near as you can, a list of that property including the teacherage and garage and those things.

A. The teacherage——

By the Court: You mean the property that was not destroyed by fire?

Mr. Lee: Yes, but was covered by the policies.

Mr. Anderson: We object to that as incompetent, irrelevant and immaterial because it is separate in the property itself, and not even involved in this action.

Mr. Lee: I think it is involved in this way, because some of the witnesses have testified as to the total cost of this property.

Mr. Anderson: No, they testified to the cost of this property that was destroyed, that was involved in this action.

By the Court: I don't remember any testimony relating to anything except the building proper and the furnishings and equipment of the building.

Mr. Lee: I think the testimony might be competent on another theory.

The Court: I have no objection, however, to his testifying but I think it is immaterial, but if you want it you may have it, and the Court will instruct the jury that setting out that particular property which is not covered by this suit——

Mr. Lee: I am not offering it for the purpose of confusing the issues or anything of that kind.

By the Court: You may proceed.

Mr. Anderson: Exception.

[fol. 343] By Mr. Lee:

Q. What was the teacherage. Just describe the building briefly and in a general way.

A. It is a five room frame building.

Q. Do you know about what it was worth?

A. Well, I would estimate it at somewheres between $2500 and $3000. It was built at two different times, part of which building has a different building on it.

Q. And what kind of a garage did you have?

A. It is a tin garage, studded with two by fours, and no floor on it, and this corrugated tin.

Q. What kind of fixtures and furniture did you have in the teacherage?

A. Stove and table, six bent wood chairs, two rocking chairs, a kitchen cabinet, and two bedsteads and springs, two mattresses.

Q. About $250 or $300 worth of furniture?

A. I expect $300 to $350; maybe $400.

Q. And what did the power plant consist of, do you remember the size of that building just approximately?

A. It is a brick building 10 by 12, with two Delco machines in it, and a pressure tank for holding water.

Q. The power plant had a heav- concrete floor, did it?

A. Yes, sir, the power plant had a concrete floor.
Q. These machines were set on the concrete base?
A. Concrete block about two feet square.

By the Court:

Q. What was the reasonable value of the power plant?
A. Well, approximately $1500, I would say.

By the Court: And the garage?
A. It cost $300 or $350; $350, I think it was when it was built.

By Mr. Lee:

Q. Do you know what the value of that machinery was in the power plant approximately?
A. I couldn't state the value of that as they offered one of those Delco engines for sale here last month, and received bids, and $45 was what they got, an offer for one of the oldest engines in the building, and they didn't accept it.
Q. You don't know what those engines cost new?
A. No, sir, they were bought before I came there.

(Witness excused.)

[fol. 344] GEORGE W. KLINE was thereupon recalled by the defendants and, having been first duly sworn, further testified as follows:

Redirect examination.

By Mr. Lee:

Q. State your name.
A. George W. Kline.
Q. Are you the same Mr. Kline who testified on behalf of the plaintiff in this case?
A. Yes, sir.
Q. Where do you live?
A. Oklahoma City.
Q. What is your business or profession?
A. Claim adjuster.
Q. For whom?
A. Trezevant and Cochran of Dallas.

Q. How long have you been in that line of business?

A. Since about 1913 or 1914.

Q. In that time have you in your experience become familiar with the cost prices, replacement prices and sound values of different types of buildings?

A. In a general way, yes.

Q. You, I believe, testified before that you were one of the adjusters who investigated the loss involved in this case, the loss of the school building?

A. Yes, sir.

Q. Now, from your experience in the adjusting business, could you tell approximately the replacement cost and sound value of that school building in January, 1926?

A. I didn't attempt to.

Q. You didn't attempt to?

A. I didn't attempt to.

Q. Were you ever at that scene of the loss, after the loss, after the fire?

A. Yes, sir.

Q. About when were you there first?

A. Probably ten days or two weeks after the fire.

Q. Were you there with Mr. Fuller at that time?

A. Yes, sir.

Q. When was the next time you were back there?

A. Sometime late in February.

Q. Was that at the time when this conference was had between you and the adjusters and the school board?

[fol. 345] A. Yes, sir.

Q. Were you present there at that conference during all of the time the conference lasted?

A. Yes, sir.

Q. How did you happen to be there at the conference?

A. Mr. Fuller and I had attended a fire inspection meeting at Drumright and Cushing, and being in that neighborhood got into communication with the contractor, who was figuring the loss for us, and he had his figures ready and would like to have a meeting with this board, if possible, as he wanted the job, and Mr. Fuller and I then advised Mr. Langston that we would like to meet with him.

Q. Who was the contractor?

A. Mr. Frank Cableman [Kebelman].

Q. Then you did have a meeting?

A. Yes, sir.

Q. Was Mr. Cableman [Kebelman] there?

A. Yes, sir.

Q. What took place in that meeting in a general way?

A. After all of us had been introduced around to all the members of the board and possibly one or two non-members of the board who were present, we asked the board for such information as they had on the loss, and they having no figures on the building, Mr. Fuller asked Mr. Cableman [Kebelman] whether he had his figures. He did produce them and quite a bit of calculating back and forth was done to get the fixtures properly designated as fixed or movable. I remember there was considerable discussion about the gas steam radiators and about some domestic science tables that were connected to the units for steam purposes, and the seats, and after all of those items were satisfactorily identified, Mr. Cableman [Kebelman] and Mr. Fuller and Mr. Mullens and I cast up a set of figures and arrived at a cost to reconstruct of about $55,000, and suggested to the board that we would submit, if they cared to, the proposition of the statement to the companies on the basis of about $52,800, in the neighborhood of $53,000, I don't recall the exact figures.

Q. That was on the building, you mean?

A. That was on the building. The amount of movable fixtures was considerably in excess of the amount of insurance that was in force, and the board was so advised, and no particular discussion was had on that item.

[fol. 346] Q. And did you or any of you adjusters at that time submit to the board the total amount that you figured up the sound value of all the property covered that had been destroyed?

A. Yes.

Q. You say you cast up a set of figures there. I hand you defendant's Exhibit A and ask you to state what it is.

A. This is the calculation on the loss of which I just spoke.

Q. And what was done with that calculation of the loss?

A. It was handed to the members of the board for consideration.

Q. And then what happened?

A. They asked permission to leave the room for a conference among themselves, and retired to the porch of the building or the yard around it, and came back shortly thereafter.

Q. Now, was anything said by them or any of them when they came back?

A. Yes. Mr. Quigley was spokesman for them when they came back, and advised us they didn't care to consider or accept rather what we had made, because they had been advised by an attorney that the total insurance was collectable, and he would charge them a fee, if my memory serves me right, of $2500 to collect it.

Q. Was there anything said there, if you remember, about Mr. Cableman [Kebelman] making a contract with the school board?

A. The board members, I don't just remember whether individually or all, questioned the ability of Mr. Cableman [Kebelman] about reconstructing this building, and we assured them as well as we knew how of our confidence in Mr. Cableman's [Kebelman's] ability, both to estimate the cost of the building and to reconstruct it, and Mr. Cableman [Kebelman] expressed a willingness to do the work for that amount of money if they saw fit to arrange to have him paid, and indicated to them that he was anxious to do the work for that amount of money, and was willing to protect them with a bond for faithful performance of the contract, based on the figures that he had there.

Q. Now, was anything said at that time about the insurance companies hiring Mr. Cableman [Kebelman] or replacing this building themselves?

A. There may have been. I don't remember. There was talk back and forth and discussion of one item and then another, and if anything of that sort was said it has es- [fol. 347] caped me, although it would not have any particular importance if it had.

Q. You say it would not have been of any importance. Why?

A. Because so far as my companies are concerned, I would not have been a party in any attempt to rebuild the building.

Q. Why not?

A. Because, in the first place, of the difficulty of looking after a multiplicity of claims of that sort if you attempt to rebuild it, with the expense of supervision and continued attention, and the fact that you have no way of determining when you are through building.

Q. You mean by that that you could not satisfy the school board?

A. Or any other assured. That is usually about the second that is shot at us anyway in the adjustment of a loss, "You just go ahead and put it back." However, in my experience, the companies that I have had occasion to represent on the adjustment of losses, have never exercised the option to replace a building.

Q. Now, Mr. Kline, you say something was said about filling out the proof of loss or taking proof of loss if they agreed on your figures.

A. Yes, sir.

Q. Who said that?

A. My recollection is Mr. Fuller said that. He really did most of the talking there. I don't recall his exact words, but his conversation being to the effect that if these were agreeable we would submit to them proofs of loss for execution, and submit them to the company for consideration.

Q. Now, Mr. Kline, have you any authority as an adjuster to admit or deny liability without special instructions from the companies you represent?

A. No, sir.

Q. What do you do if in your opinion after investigation there is a doubt as to liability or doubt as to whether or not you should deny liability?

A. I get all of the facts possible and submit them to the company, possibly with my views in regard to the matter and ask for instructions.

Q. Do you ever or have you ever in your experience as an adjuster told an assured that any of the provisions of the policy would not be enforced?

[fol. 348] A. No, sir.

Q. Have you ever told an insured that he need not furnish a proof of loss?

Mr. Anderson: I believe that has gone far enough.

By the Court: Yes, it wouldn't be material what he did in other cases.

By Mr. Lee:

Q. Did you ever tell this school board in this case that they need not furnish a proof of loss?

A. No, sir.

Q. After the school board came back in from that conference outside the room and stated that they did not care to accept the figures you adjusters had submitted, what else was said there, if you remember?

A. There wasn't a great deal more said. Mr. Fuller advised them that there was no use prolonging the conference, or words to that effect, and that if they had fully made up their minds to proceed along those lines, their policy would give them full instructions how to proceed with the presentation of their claim.

Cross-examination.

By Mr. Anderson:

Q. So that the board's own representative called off those negotiations?

A. I beg your pardon?

Q. So, it was Mr. Fuller, the board's own representative, that called off negotiations with them, told them that their policy would tell them how to proceed, and that there wasn't any use going any further?

A. You asked whether it was Mr. Fuller's statement?

Q. Yes.

A. Yes.

Q. Did you understand he was representing this school board in that meeting in any sense?

A. No, if he had such authority he never told me of it.

Q. He didn't tell them either, that you know of?

A. It wasn't discussed any.

Q. Now, Mr. Kline, I wish you would tell me just what you were out there to do.

A. To establish, if possible, the sound value and loss and damage on that building and report back to my company.

Q. What does sound value represent?

A. The value of a piece of property.

[fol. 349] Q. The value of a piece of property?

A. We refer to sound value of a piece of property, another expression that is used in some jurisdictions is cash value, meaning thereby the cost to reconstruct less depreciation.

Q. Doesn't it represent the amount the company will pay?

A. Not necessarily.

Q. Doesn't it represent the amount of loss so far as the policy is concerned?

A. Not necessarily.

Q. Does it ever?

A. Often does.

Q. I will ask you if that isn't actually what it means, that it is simply the amount for which the insurance companies are liable?

A. There is no showing that they are liable at all until they pay it.

Q. There is no showing until they pay it?

A. No.

Q. Did you determine the sound value of all this property regardless of the question of the liability of the company?

A. In the first place, I didn't determine any liability of any sound value.

Q. Well, did you satisfy yourself as to the sound value of all this property as an adjuster for your company?

A. Yes, I was satisfied as to the sound values of the property involved.

Q. The figures you put down on this instrument I hold in my hand as Plaintiff's Exhibit A, does that represent the sound value of all this property?

A. I didn't put those figures down.

Q. You saw them, didn't you?

A. Oh, yes, I saw them.

Q. Did it represent the sound value of all this property?

A. It was our opinion of the sound value of the property. The sound value has not yet been established.

Q. What was the sound value of this movable furniture?

A. In our opinion?

Q. Yes.

A. I don't remember. It was somewhere in excess of $3600 or $3800, possibly $4000.

[fol. 350] Q. It was more than the insurance?

A. Yes, sir.

Q. I will ask you to examine Exhibit A, and tell me if you put the figure down there, any figure that refers to the movable furniture except the amount of your liability? I will ask you if it doesn't represent exactly the total amount of the insurance?

A. Yes, sir, it represents the amount of the insurance.

Q. It doesn't represent the sound value then?

A. The sound value was in excess of that so there was no occasion to consider it.

Q. So the figure he put down was the insurance liability?

A. The amount in force on it, yes.

Q. And the other figures you put down were the maximum amount you adjusters would concede the insurance company was liable for, wasn't it?

A. No, I wouldn't say that.

Q. Your final conclusion of those figures is that, isn't it?

A. That was the suggestion we made in regard to the settling of this loss.

Q. You never did question the insurance on your movable furniture, did you, in your negotiations?

A. What do you mean by question it?

Q. Well, you always concede in those negotiations that you are liable for the total amount of insurance on that movable furniture.

A. We concede there was $3399.99 in insurance on it.

Q. And that the companies were liable for all of that, aren't they?

A. No, sir.

Q. And were willing to pay all of that insurance?

A. No, sir.

Q. You tell this jury now that that property was worth far more than the insurance on it?

A. Yes, sir.

Q. I will ask you if you don't know that your company, in this law suit, is denying all liability on the movable furniture now?

A. I would have to ask the lawyers there. I don't know.

Q. I asked you if you knew. You never saw this building that was destroyed?

A. Before it was destroyed?

[fol. 351] Q. Yes?

A. Yes, I went *buy* [by] it a number of times on the train; could see it from the train, but I never was in it or on the ground.

Q. You didn't know anything about its value?

A. No.

Q. You never tried to determine for yourself what the

value was, but you relied solely on figures furnished you by Mr. Cableman [Kebelman]?

A. Entirely.

Q. And Mr. Cableman [Kebelman] represented your [you] adjusters?

A. Mr. Cableman [Kebelman] was making a set of figures for our use and advised us, to verify for us the value of that building if it could be done.

Q. He wasn't there in any sense as a representative of this school board, was he, so far as you know?

A. Mr. Cableman [Kebelman] was not, because he wanted a job.

Q. He wasn't there representing this school board, was he?

A. I don't think so, so far as I know.

Q. And this school board, so far as you know, never even sent for him to come up there?

A. I don't think so; I don't know.

Q. He went to that meeting because you adjusters had him come there, didn't he?

A. No, we went to the meeting because Mr. Cableman [Kebelman] wanted to go.

Q. You went to the meeting because he wanted to go?

A. Yes, sir.

Q. Did he send for your [you] adjusters?

A. He advised us that he had his estimates ready, and that he was ready to submit the figures if he could arrange a meeting with the school board, he wanted us to do it.

Q. Who arranged that meeting?

A. Mr. Fuller and I.

Q. You say he wanted a contract?

A. Yes, sir.

Q. That was your contractor wanted a contract?

A. He wanted to build the building if he could get the job.

[fol. 352] Q. You didn't expect to pay him anything for working for you if he could make a contract with this school board?

A. Exactly.

Q. He told you that he thought he was satisfied and ready to contract with this board to build back a building in exactly the condition it was, a part of which he had no plans and specifications on?

A. No, sir, he didn't say that.

Q. All right, what did he say?

A. He said that the estimate that he had made and the figures that he had made on this building contemplated the reconstruction of the new part in exactly the same shape as the plans and specifications which are only fragmentary as to the whole building called for, and the rest of his estimate was made on the basis of similar construction of the old building.

Q. Do you think he could have done that satisfactorily without plans and specifications? Just tell the jury whether or not you believe in good faith he could do it.

A. I had confidence enough in him to have him go up there and advise me; yes, I had confidence in his ability to do it.

Q. You knew plans and specifications have a great deal to do with the cost of a building, didn't you?

A. No. On the contrary I am pretty well convinced that plans and specifications didn't mean a great deal.

Q. Whatever he proposed there to the board, he proposed to build back a building just like the one that had been destroyed?

A. As nearly like the one destroyed as the information which the board could produce by exhibiting all of its records called for.

Q. He wanted a contract with them that day, didn't he?

A. Any time they were ready to contract.

Q. Is it true he had a bond there that day and wanted to enter into a contract with the board that day?

A. I don't know. A contractor usually has a bond to execute after he makes a bid.

Q. Did you see any bond he had there?

A. I don't remember. He may have had. I don't recall it.

Q. You don't remember it?

A. No, sir.

[fol. 353] Q. You don't remember seeing any contract he proposed to enter into either?

A. No, he may have submitted that, I don't know. As I said awhile ago, they were passing papers back and forth. He had quite a mass of figures and sketches, and he may have had papers of that sort among them, the memory of which doesn't stay by me. If he did I don't remember.

Q. But you didn't see it?

A. To my memory, not.

Q. You say you wouldn- have had a lot of trouble in building this building back? That is one reason you didn't want to enter into an agreement to do it?

A. I said the difficulty of supervision with other work that has to be looked after on other claims, would make the reconstruction on the part of the insurance company one that would not be practicable.

Q. It wouldn't be any more trouble for the insurance companies to build it back than it would the school board, would it?

A. Yes, it would.

Q. Why?

A. Because the school board had Mr. Perswell there to see that the bricks were properly cleaned. We would have to send someone there from somewhere else and go to the expense of supervising.

Q. The contractor would use Mr. Perswell. That was the man who was admitted to the Bar and testified here?

A. Yes, sir.

Redirect examination.

By Mr. Lee:

Q. Did you attempt to get the plaintiff board to agree that the sound value of that building was less than what you thought it really was?

A. No, sir.

Q. Were you ever furnished with any plans or specifications on the old part of that building?

A. No, sir.

Q. Were you ever furnished with any figures or estimates showing what the plaintiff school board contended the actual cash value or sound value of this school building was at the time of the fire?

A. No, sir.

(Witness excused.)

[fol. 354] Frank L. Cableman [Kebelman], was thereupon called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. State your name.

A. Frank L. Cableman [Kebelman].

Q. Where do you live?

A. Oklahoma City.

Q. What is your business?

A. Well, I am an estimator and partner in the J. W. Mann Construction Company.

Q. What is the business of the J. W. Mann Construction Company?

A. Well, general building construction, roads and bridges and public works.

Q. How long have you been a partner in the J. W. Mann Construction Company?

A. About three years. I don't recall just how long.

Q. Were you thus connected with that company in the latter part of February, 1926?

A. Yes, sir.

Q. Do you remember of visiting the scene of the loss involved in this case wherein the building of school district No. 98, Payne County, Oklahoma, had been destroyed by fire?

A. I do.

Q. About when did you first visit the scene of that loss, if you remember?

A. Well, I don't remember. It was some few days after the fire.

Q. Did you ever talk with Mr. Fisher who testified here yesterday as a witness about this particular building?

A. I did.

Q. Were you or not called into this matter by Mr. Fuller?

A. I believe that is correct. I was called in by Mr. Fuller.

Q. And what did Mr. Fuller ask you to do?

A. Well, just like any other job, he simply called me in and said, "Here is a job", and asked me if I cared to take care of it and I said certainly.

Q. And what did you do as a result of that conversation?

A. Well, I visited the scene of the fire, and in the meantime I had been furnished some plans and I believe later [fol. 355] specifications, and I visited the scene of the fire, checked over such details and debris and so forth that was

left, and took the plans and specifications and made an estimate covering the reconstruction.

Q. And what was the amount of that estimate?

A. Well, about $53,000.

Q. Did you have information at that time that Mr. Fisher whom we referred to a few moments ago, had been the architect or engineer upon the new part of that building?

A. I did.

Q. Did you consult with him with reference to the building?

A. I did.

Q. Did you consult with him in reference to your replacement figures?

A. I did.

Q. Did you have any agreement with him with reference to him participating with you or being a party to the rebuilding of this building?

A. I did.

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Yes, it is purely hearsay. Any conversation between the witness and Mr. Fisher would not be competent unless some of the plaintiff's [plaintiffs] were present.

Mr. Lee: It might go to the question of the ability of this man which by insinuation has been questioned, to perform any contract he might make. The parties on whose behalf he proposed to make the contract.

By the Court: He can testify he had a conversation with Mr. Fisher. He can testify that he talked to him and advised with him, but he could not disclose the substance of that conversation. That would be hearsay and would not be binding.

Mr. Lee: I want to suggest further to the court that the testimony of plaintiffs has been to the effect that Mr. Fisher was the man who drew these plans and specifications and superintended the construction of the new part of this building and the remodeling of the old building, and must have been very familiar with the construction of both parts of that building, and it will show that this witness——

[fol. 356] By the Court: He testified to that on the stand, Mr. Fisher did.

Mr. Lee. That is very true.

By the Court: It certainly would not be competent, any conversation between this witness and Mr. Fisher.

Mr. Lee: But if this witness had an agreement with Fisher by which they were to perform this contract together, then it would show that he was possessed, he and the men who were to enter into the contract, were possessed of the information necessary to replace that building just as it was.

By the Court: If you want to offer it for that purpose I will admit it.

Mr. Lee: That is the purpose I am offering it for.

Mr. Anderson: Exception.

By the Court: You want to show by this witness that he had talked with Mr. Fisher, and had an opportunity to get all the information that was necessary to reconstruct that building.

Mr. Lee: And Mr. Fisher was going to participate in the reconstruction of that building.

By the Court: Overruled.

Mr. Anderson: Exception.

By Mr. Lee:

Q. State, Mr. Cableman [Kebelman], whether or not you had an agreement with Mr. Fisher by which he was to participate with you in the reconstruction of this building if you got the contract?

A. I did have such an agreement.

Q. And did Mr. Fisher at that time know, or had you shown him your figures upon your estimated cost of the replacement of this building?

A. I did.

Q. How many years of experience have you had in this line of work?

A. About ten.

Q. What did you do immediately prior to the time you started into this line of work?

A. Well, I have been three years in the corps of engineers in the United Staets Army prior to the time I started into this.

[fol. 357] Q. Prior to your service in the army, by the way, when was that service?

A. From February, 1917, until about October, 1919.

Q. Where.

A. Well, in America and in France.

Q. Prior to your service in the army what, if any, training did you have in this line of work?

A. Well, I was in the engineering department of the Otis Elevator Company.

Q. How long were you there?

A. About three years and perhaps a little longer.

Q. Had you had any other training for this line of work?

A. Well, I was a graduate of the University of Texas in engineering in 1913.

Q. You took what kind of an engineering course?

A. Structural. That is, I got a C.E. degree, but I majored in structural.

Q. Now, Mr. Cableman [Kebelman], have you had any considerable amount of experience in estimating and determining the construction cost of buildings such as the building involved in this case?

A. Well, my modesty would always prevent me from answering that question. Of course, I have had—

By the Court: You need not refer to your modesty in the court room. Nobody else does.

A. I would say yes.

By Mr. Lee:

Q. What did you figure it would cost you to replace this building involved in this action?

A. Well, I don't recall that exactly, but I think we had estimated a profit somewhere in the neighborhood of $10,000.

Q. A profit of something like $10,000. You mean upon the figures there which you proposed there at that conference to construct this building for?

A. Yes, sir.

Q. Do you know what that type of building, a building such as this one involved in this case would cost per cubic foot of content?

A. I would say yes.

Q. About January, 1926, and what could be the cost per cubic foot of content?

A. I would say it should not exceed 25 cents.

Q. Will you please refer to the——

[fol. 358] By the Court: What were the dimensions of this old building:

Mr. Lee: That is just what I am trying to get right now.

By Mr. Lee:

Q. Refer to the plans and specifications which have been introduced in evidence as plaintiff's Exhibit 9 to 14, inclusive.

A. 103 feet, 2 inches in length and the breadth is 55 feet and 5 inches.

Q. What is the height.

A. There is no dimensions on these plans. That height would have to be scaled.

Q. Have you scaled it?

By the Court: He can approximate it.

A. I would say about 36 feet.

By Mr. Lee:

Q. Were you present at the conference which has been described here in the testimony as having taken place at the scene of this loss between the school board and the adjusters, Mr. Fuller, Kline and Mullens?

A. Yes, sir.

Q. For what purpose were you there?

A. Well, I was there in an attempt to get a job.

Q. Well, did you make your purpose known to that meeting?

A. I believe so.

Q. In what way?

A. Well, somewhere in the conversation, of course, it has been sometime ago, I don't remember exactly, but I made the remark that I would very much like to have the job if there was any way it could be worked out, that the contract could be given me.

Q. What did they say? The board?

A. Well, I don't recall.

Q. Did you get the contract?

A. No, sir.

Q. Did you know when the contract was let?

A. No, sir.

Q. Did you say anything to them about advising you of the letting of the contract when they got ready to let it?

A. Certainly. I asked to be notified that I might have permission to bid on the job.

[fol. 359] Q. Did you ever receive any notice?

A. No, sir.

Q. Well, did you say anything to the members of the board at that conference about being ready to enter into a contract with them?

A. I believe I made such a statement.

Q. Did you say anything about a bond for the performance of the contract?

A. Yes, sir; I believe I did.

Q. What did you say?

A. Oh, simply that in the event that it could be worked out that I got the contract, that I was ready to furnish a surety bond with any surety company in Oklahoma to guarantee the fulfillment of that contract.

Q. Were you in a position to do that?

A. Yes, sir.

Q. Were you able to perform a contract of that kind and furnish that kind of a bond?

A. Certainly.

Cross-examination.

By Mr. Anderson:

Q. You say you and Mr. Fisher were going to build it?

A. I didn't say that; nos [no], sir.

Q. He was to be in with you?

A. Yes, sir; in the event the contract was received.

Q. If Mr. Fisher could have built it at his figure he gave on the witness stand yesterday you would have made a fortune, wouldn't you?

A. I don't know.

Q. Did you hear his testimony yesterday?

A. I believe so.

Q. Did you hear his testimony in which the deductions from the figures he gave showed about $7500.00 to rebuild it?

A. I believe I heard no such testimony.

Q. You didn't.

A. No, sir.

Q. It couldn't be rebult [rebuilt] for from nine to fifteen cents a cubic foot, could it?

A. Well, I didn't testify to that. My testimony shows what, in my opinion, it could be rebuilt for.

Q. Could it be rebuilt for from nine to fifteen cents?

[fol. 360] A. My testimony is a matter of record.

By the Court: Answer the question.

A. In my opinion it could not.

By Mr. Anderson:

Q. What kind of floors were in that building?

A. I have worked a thousand estimates since that, maybe more. It occurred three years ago, and you think I can carry the information in my head as to what was in that building?

Q. Do you have your estimate with you?

A. No, sir.

Q. Do you have your figures with you?

A. No, sir; I do not.

Q. Did you make them up at the time you made this estimate?

A. I beg your pardon?

Q. Did you make up the figures and estimate at the time?

A. Certainly.

Q. Where are they?

A. I presume they are in my office. I have no idea where they are.

Q. You were not even requested to bring them here?

A. No, sir.

Q. You can't tell this jury now what kind of floors were in this building?

A. I can refer to the plans and specifications and tell you.

Q. Refer to these and tell me what kind was in that old building?

A. In the old building?

Q. Yes, the original part of it.

A. If you are asking simply to confuse me——

Q. No, I am trying to find out for the benefit of this jury about how much you actually knew what you were going to rebuild?

A. May I answer that in another way?

Q. Yes.

A. Mr. Fisher was the architect on the reconstruction, and did know and did have the knowledge of what was in the

building, and he was consulted in the preparation of the instrument.

Q. Did he tell you what kind of floors were in the original building?

[fol. 361] A. To the best of my recollection, he did.

Q. Did he tell you what kind of woodwork it was throughout the building?

A. I believe there was enough left of that to show what kind of woodwork was in that building.

Q. Was any of the woodwork left on the old building?

A. It wouldn't take very much. I don't know.

Q. Just answer my question? Was there any?

A. I can't answer. It has been too long ago.

Q. How many rooms were in the old building?

A. I couldn't answer that.

Q. How much did you put in your estimate for the tile which was in that building, tile floor and tile walls?

A. I can't answer your question because you are asking me for something I haven't seen in three years.

Q. You have got that information, haven't you?

A. I pressume I can get it; yes.

Q. Will you get it and bring it to this court?

A. Why certainly.

Q. You don't have a bit of that information with you here now?

A. No, sir; I have not.

Q. Can you tell anything about the toilets that were in that building and permanent fixtures, which go in as a part of the building?

A. Well, I just replied that I had no information on the subject now. I presume I could get it by getting you the files.

By the Court: I suggest Mr. Anderson, you indicate to him the information you would like to have.

Mr. Anderson: I would like to have the information on which he figured his estimate, and what went into his estimate, his complete information that disclosed the figure he gave at that meeting. I would like an opportunity to examine him after he gets it.

A. I couldn't tell you now. I would have to get that file and that particular estimate and go over it.

Mr. Anderson: I desire he be excused and I would like to be allowed to cross-examine him a little later because I am getting nowhere as it is.

Mr. Lee: That suits us. If the witness can find his estimate we would be glad for him to have it.

[fol. 362] By the Court: You will be excused Mr. Cableman [Kebelman], and we will give you until 2 o'clock to be ready to answer the question. That will give you sufficient time.

A. You understand, we simply place the files away at the end of one year's time, I don't know whether I can find them or not.

Mr. Anderson: In fairness to you, I want you to bring me everything you have got in relation to this building.

A. I will certainly do that.

(Witness excused.)

(Thereupon Court adjourned until 1:30 o'clock P. M. this date, at which time Court reconvened, all parties being present as heretofore, further proceedings in the trial of the above entitled cause were had as follows, to-wit:)

Proceedings, 1:30 P. M.

Frank L. Cableman [Kabelman] was thereupon recalled, and, having been previously sworn, further testified as follows:

Cross-examination (continued).

By Mr. Anderson:

Q. Did you find your files?

A. No, sir; I did not.

Q. Did you find any information as to this building?

A. No, sir; I did not.

Q. I take it then you can not submit anything then as to the details of that building.

A. Well, Mr. Anderson, I couldn't; no, sir.

Q. You can't tell me how many rooms were in it?

A. No.

Q. You can't tell me what kind of flooring was in it?
A. Am I permitted to ask plaintiff's counsel a question?

The Court: The witness states he has no recollection at all about any of these details except such as would be contained in his memorandum that he can't find.

A. If you briefed the case three years ago can you remember the details of that brief?
Mr. Anderson: Some I do and some I don't.

By Mr. Anderson:

Q. Were you going to take this contract in your own name or the name of your company?
[fol. 363] A. Well, it would have been taken in the name of J. W. Mann Construction Company.
Q. Did you tell the school board that?
A. I don't believe I did.
Q. You say you have built school buildings before?
A. Yes, sir.
Q. I will ask you if you don't know as a matter of fact that the school board meeting—that a school board couldn't contract with you at that time?
A. Certainly I knew that.
Q. And you knew it was useless to offer to make a contract with the board?
A. No, sir; I did not.
Q. Do you mean to say you were trying to make a contract with them?
A. Well, there are methods by which I believe they could have let a contract on that building. I may be wrong about it.

By the Court: Just a moment gentlemen. The Court will hold the only purpose for which this evidence could be introduced, any of the evidence so far as this witness is concerned, would be to the extent that it might throw light on the value of that building as reconstructed. Now, as to whether or not the board wanted to do it, that is a matter within their own discretion. It is immaterial. It would not be binding on the Board. The Board of Education could only let contracts as provided by statutes, and the only purpose for which this was admitted at all

was for the purpose of throwing such light as it could on the actual cash value of the building at the time it burned.

Mr. Anderson: Yes, sir; I think your Honor, it would probably be proper for me to cross-examine him as to the good faith of the offer they say they were making.

The Court: Yes, that is all right, but even then, suppose this man was willing to go ahead and construct this building, for a certain amount of money. Even that would not be binding on the school board because he might build the building for $10,000 or $20,000 less than it actually cost. I have known good contractors to lose money on contracts. The value of the property would not be determined. It is merely a circumstance that would go to determine the actual value of the building.

By Mr. Anderson:

Q. Since you have no record as to this, do you recall any [fol. 364] of the details on which your estimate was made?

A. No, sir; I do not.

Q. You couldn't even tell me how much you put in there for architect fees for drawing the plans, if any?

A. Well, Mr. Anderson, I am sorry. I told you I had prepared none of the details, and I don't remember that either.

Q. May I ask you if you included anything for compensation insurance?

A. Why certainly.

Q. Can you tell me how much you put in for that?

A. I think, $4.50 per hundred, somewhere in the neighborhood [neighborhood] of $4.50 per hundred compensation insurance, it cost us at that time.

Q. I take it you never saw that building?

A. No, sir; I never saw the building.

Q. Did you see the ruins?

A. Yes, sir.

Q. There wasn't much left of that, was there?

A. I don't recall just how much was left.

Q. Do you remember the condition of the foundation?

A. Yes, sir; but my estimate was on an entirely new structure.

Q. On a new foundation?

A. Yes, sir.

Q. I take it you considered then the foundation itself was destroyed, that is, to the extent that it was useless?

A. If I was going up there in good faith and attempting to get that contract which I really was, I certainly wanted to please the board of education, and if there is any question about the foundation, I wouldn't take a chance on it.

Q. Then if you didn't intend to use the old foundation I take it you did feel it wasn't sufficient to take any chance on?

A. That is a question of detail of the estimate, but I do recall faintly that the estimate was based on an entirely new construction.

Q. Let me ask you this as a contractor. Would it not be difficult indeed to make an estimate of what it would cost to build a building if you didn't have the plans and specifications on it?

A. No, sir.

Q. It would not be?

[fol. 365] A. No, sir; not under the conditions under which this estimate was made.

Q. I take it you had no plans or specifications as to the old building except such as maybe connected with this new building.

A. Mr. Anderson——

The Court: Just answer the question yes or no if you can. We are taking too much time on this case gentlemen.

(Question read.)

A. Yes, sir; that is correct.

By Mr. Anderson:

Q. You say it would not be a difficult matter to submit an estimate on a building you didn't have any plans or specifications on?

A. The Judge didn't let me finish.

The Court: Answer yes or no and then you can explain.

A. In this particular case, no.

By Mr. Anderson:

Q. You had sufficient information I take it?

A. Yes, sir.

Q. To satisfy yourself?
A. Yes, sir.

Redirect examination.

By Mr. Lee:

Q. Mr. Cableman [Kabelman], you said you were unable to find the files. Have you folks moved your offices since you have made this estimate?
A. Yes, sir.
Q. How long ordinarily do you keep your estimates on jobs that you don't get a contract on?
A. Ordinarily about a year.
Q. Did you make a diligent search for these files?
A. I did.
Q. And were unable to find them?
A. That is correct.
Q. What were your instructions from Mr. Fuller or these adjusters at the time they arranged with you to make this estimate with reference to the amount you would make the estimate at?
A. Well, Mr. Lee, my instructions were——

[fol. 366] Mr. Anderson: I think what they may have instructed their representative would be hearsay. He may testify as to what he did.

The Court: Yes, I think that would be the proper rule. Whatever advice was given to this man by Mr. Fuller would not bind the plaintiffs.

Mr. Lee: That is true, but it only goes to the question of good faith.

The Court: All right, you may answer it.

Mr. Anderson: Exception.

(Previous question read.)

A. Those instructions are the same always, and are these: When I go out on any loss I am instructed to make an estimate on the basis of what I would immediately enter into a contract for and make a surety bond for the amount.
Q. And that is what you did in this case?
A. Yes, sir.

Q. Now, at the time you made this estimate, made up these figures, amounting to a total of $53,000, and some odd dollars as you have testified, did you have or consider that you had at that time all of the details necessary for you to figure the cost of the construction of that building?

A. Certainly.

By the Court:

Q. Where did you get this information?

A. Well, I got the information from the plans and specifications on the addition and what showed of the old building. Then I got in touch with the only man as far as I was able to learn who knew anything about the construction of the old building, and that was Mr. Ward H. Fisher. Inq [In] his making of these plans for the new addition he was certain to have full knowledge of the old building or he could not have completed the plans which are furnished here as an exhibit of the plaintiff.

By the Court:

Q. From Mr. Fisher, and from Mr. Fuller. Who else did you get information from?

A. From Mr. Fisher and Mr. Fuller and the fact that I went there and viewed the building.

The Court: Talked to members of the board?

A. I believe that I did; yes, sir.

(Witness excused.)

[fol. 367] Mr. Lee: We expected to use Mr. S. A. Layton as a witness, but he was called out of town and expected to be back here before now. It is true we didn't have any subpoena for him. He agreed to come up here any time we wanted him, and we of course haven't got him here, but in the event he does come before the evidence is finally closed, we would like to have the Court grant us permission at that time to use his evidence.

The Court: You are offering him as an expert?

Mr. Lee: Yes, he will be an expert on the cost of the building. Just along that line solely.

The Court: I see no objection to that. Have you any objection Mr. Anderson?

Mr. Anderson: Not a bit so far as we are concerned.

The Court: That is all right. That arrangement may be made.

Mr. Thurman: I have made arrangements with his office to notify us just the minute he gets back in town.

Mr. Lee: The defendant with that understanding rests.

Mr. Anderson: The plaintiff rests.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Lee: Comes now the defendants and each of them and move the court to direct the jury to return a verdict in favor of the defendants and each of them.

The Court: Overruled.

Mr. Lee: Exception.

(Thereupon the matter was argued to the jury by the attorneys for the respective parties.)

(Whereupon Court adjourned until 10 o'clock A. M. January 17, 1928, at which time Court re-convened, and all parties being present as heretofore, the trial of the above entitled cause was resumed, and further proceedings were had therein as follows, to-wit:)

[fol. 368] Proceedings, January 17, 1928, 10 o'clock A. M.

(Thereupon, the evidence being closed and the arguments to the jury being concluded, the Court instructed the jury as follows:)

CHARGE TO THE JURY

By the COURT:

GENTLEMEN OF THE JURY: The above-named cases have been consolidated for the purposes of this trial, and so the issues in all of the cases will be determined and a separate

verdict will be rendered in each case, all depending upon the same state of facts for determination.

These actions were originally instituted in the District Court of Payne County, Oklahoma, and from there removed to this court. The allegations of the first amended petition in each case are substantially as follows:

The plaintiff, a school district duly organized under the laws of the State of Oklahoma, was authorized to sue and be sued and do business in its corporate name of School District No. 98 of Payne County, Oklahoma; that the defendants are foreign corporations engaged in the insurance business and duly licensed and authorized to do business in the State of Oklahoma; that on the 24th day of October, 1925, the plaintiff for a valuable consideration in money which was accepted by the defendants and received by the defendants, had executed and delivered to it an insurance policy in each of said defendant companies, which insurance policies agreed to insure and did insure the school building owned by the plaintiff school district on the northeast quarter of section one, township 18 north, range five east, Payne County, Oklahoma, for a period of one year from the 24th day of October, 1925 to the 24th day of October, 1926, against all damage caused by fire, lightning, wind storms, cyclones and tornadoes in the sum of $75,000. The face amounts of the respective policies being as follows:

Concordia, $25,000.00.

Royal Insurance Company, $16,500.00.

National Fire Insurance Company, $8,500.00.

Fire Association of Philadelphia, $25,000.00.

Making a total of $75,000.00. That of the total amount of said insurance $67,000 covered the two story brick building above described; $3,400 covered the movable furniture and fixtures in said school building, and $4600 covered the ga- [fol. 369] rage & power house and contents, teacherage or residence for the teachers on the same premises owned by said plaintiff and adjacent to the school building; that all of said policies were duly issued by said defendants, delivered to the plaintiff and the premiums charged therefor were duly paid to said defendants by the plaintiff; that thereafter, to-wit: on the second day of January, 1926, said

school building was completely destroyed by fire and was damaged and wrecked and destroyed so as to render same wholly unsafe and unfit for use, and that the reasonable market value of said building at the time of such loss was the sum of $75,000.00; that the value of the movable furniture and fixtures in said building which were totally destroyed by said fire were of a reasonable market value of more than $3400. That on the date of the fire each of the local agents of the respective defendant companies was notified of said fire, and immediately thereafter and on the same date, each of said local agents notified the home office of his company as well as the general agent of said company, of said loss.

The plaintiff further alleges that pursuant to said notice that two insurance adjusters, to-wit: Guy Fuller of the Fuller Adjustment Company and George W. Klein appeared at the scene of the fire and reported to the plaintiff through its secretary and board member that they were adjusters and representatives of the defendant fire insurance companies, and asked the clerk of the plaintiff to provide them with a statement and valuation of the movable property contained in said school building and destroyed by fire, and also requested plans and specifications of the school building; that later the said adjusters procured a set of the plans of what was known as an addition, or the new part of the building, and later, within a few days and within the month of January, 1926, the said clerk of the plaintiff school board furnished to the adjusters a copy of the specifications of the new building; that said plans and specifications, and said invoice or inventory of the movable property in the school building were furnished to the said adjusters in the month of January 1926.

That thereafter, on the 27th day of February, 1926, the adjusters, to-wit: Guy Fuller, George W. Klein and Floyd J. Mullen ment [met] with the Board, the plaintiff here, at Yale, Oklahoma, and that the said Fuller, speaking for the adjusters and for the defendant companies advised the plaintiff through its members that there was no objection to the claim for $3400 for the movable property destroyed, as that was under-insured, but that the insurance on the [fol. 370] building was excessive, that he would pay the

plaintiff for the defendant companies the sum of approximately $53,000 in full settlement for the loss of building.

The plaintiff further alleges that on said occasion and at said meeting, the plaintiff board members requested the said Fuller that he have said defendants restore or rebuild said building for said sum, that they couldn't do it, and that the building could not be built for such amount, which the defendants refused to do.

The plaintiffs further alleged that the defendants have failed and refused to pay the sums due under the terms of said policies, although due and proper demand has been made upon them to make said payments.

The plaintiff asks judgment against the defendants in the following sums, to-wit: The defendant Concordia Insurance Company of Milwaukee, $23,466.66; from the Royal Insurance Company of Liverpool, $16,500; the National Fire Insurance Company, $6,966.66; The Fire Association of Philadelphia, $23,466.66.

To the amended petition of the plaintiff the defendants and each of them answer first by denying each and every material allegation in the said amended petition contained except such as are specifically admitted. They admit that they are each corporations as alleged in plaintiff's amended petition, and that the policies were executed and delivered as alleged in the plaintiff's petition, and admit that said policies and each of them are on the standard form of policy prescribed by the Statutes of Oklahoma, but deny that the said plaintiff complied with the provisions of said policies in that it failed to furnish to the defendants and each of them a proper and legal proof of loss as provided in said policies; and further deny that the plaintiff had a right to institute a suit until it had fully complied with the requirements of said policy.

The said defendants answering further, allege that the action instituted by the plaintiff was not filed within the time provided by law and was therefore barred by the statutes of limitations.

To which answer the plaintiff replies in each case, first, it denies that the provisions of the policies as set forth in paragraph three of said answer have never been waived by said defendants, and further denies that the plaintiff is not entitled to maintain the action, and denies that the same

has been prematurely brought, and in replying further ot [fol. 371] said paragraph, the plaintiff states the provisions and requirements referred to in said paragraph have been waived by the defendants as set forth in the first amended petition of plaintiff.

Replying to paragraph four, the plaintiff denies the allegations and statements contained therein.

Replying to paragraph five of said answer the plaintiff denies the statement and allegations contained therein.

Replying to paragraph six of said answer the plaintiff denies the allegations and the statements contained therein.

The defendants rely upon a section of the stipulations and conditions forming part of the policies, as follows:

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the case [cash] value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

And the theory of the defendants is that since the plain-
[fol. 372] tiff did not in each case furnish to the respective defendants a proper proof of loss in writing as described in said policy within the sixty day period immediately following the fire, and before the institution of the action in this case, that, therefore, they have forfeited their right to recover under the policy. The plaintiff, however, alleges in its reply to the answers in the various cases that the defendants have waived the proof of loss provision in the policy, and are therefore estopped from asserting or setting up the failure of the plaintiff to file such proof of loss as provided in the policy, as a bar to the plaintiff's recovery in these cases.

The defendants also contend that even though the plaintiff should recover in this case that its recovery should be not to exceed the sum of $55,809.75 for the reason that said sum constitutes the actual value of the building and property destroyed by fire on the date of the fire. The plaintiff, on the other hand contends, and it is its theory of the case, that the defendants have waived the proof of loss provided in the policy, and that the value of the property destroyed by fire was in excess of the sums stated in the face of the policy, and that the plaintiff is therefore entitled to judgment in this case in the sum of $70,400.00; that is, that the combined judgments against the various defendants should amount to said sum, to be divided as hereinafter set out.

The court will first instruct you relative to the waiver of the proof of loss pleaded by the plaintiff and which must be established before there can be any recovery. In order to properly advise you on this point, it will be necessary to review briefly the testimony in the case. The uncontradicted evidence is that the policies sued on herein were duly written by the defendants, delivered to the plaintiff, and that the pr-miums provided in said policies were duly paid by the plaintiff and accepted by the defendants. In other words, the policies were duly in force; that they were written on the 24th day of October, 1925, for a period of one year; that the fire occurred on the 2nd day of January, 1926, and that so far as the building, and equipment, both movable and attached to the building, were concerned, the fire resulted in a total loss with the exception of the salvaged brick in the building which the contractor

testified was worth $200.00. That on the same day that the fire occurred, the clerk of the school board, the plaintiff herein, notified the local agent of each of the defendants, and that the local agent immediately, and on the same day, notified by mail or telephone the said agents or general agents of the defendants, and also the home office of [fol. 373] each of the defendants; that thereafter, and about the 8th of January, there appeared Mr. Guy H. Fuller and Mr. George W. Kline, and who introduced themselves to the clerk of the board, plaintiff herein, as adjusters representing the defendant companies; that Mr. Fuller speaking for the adjusters asked the clerk of the board to furnish them with a list of the movable furniture which was destroyed, and also such other information as he could give relative to the other property in the building destroyed; that he also asked for a set of the plans and specifications, and that the clerk advised him that he was not able to furnish them at that time, but that they could be procured, whereupon Mr. Fuller advised that he would try to find the plans and specifications himself.

The evidence also shows that the adjusters viewed the ruins left by the fire and returned to Oklahoma City; thereafter, within a short time, Mr. Fuller wrote to the clerk advising him that he had not been able to procure the plans and specifications, but that thereafter the specifications were secured either by the clerk of [or] Mr. Fuller, and on the 26th of January, Mr. Fuller advised the clerk by letter that he had not been able to procure the specifications, and that within a few days the clerk procured a copy of the specifications on what was known as the new building and delivered the same to Mr. Fuller; that the building destroyed by fire consisted of what was known as the old building erected in the winter of 1917 and 1918, and the new building which was erected in 1922 or 1923; that the clerk provided Mr. Fuller with a list of all movable property, and also a list of the property which was attached to the building, and which would be considered a part of the building. As to what occurred after that, there is some discrepancy between the witnesses for plaintiff and defendants.

The evidence of the plaintiff is that on the 27th of February, they had a meeting on the school premises in what was known as the teacherage at which were present the

members of the school board, the superintendent of schools, the three adjusters, Mr. Fuller, Mr. Kline and Mr. Mullen, and Mr. Cableman [Kebelman], a contractor was present at the instance of the adjusters, and some other person was present; that at that time Mr. Fuller made a proposition after discussing the matter with the other adjusters and with the contractor, that they would pay the sum of $55,800 in full settlement of the loss. The plaintiff's witnesses further testified that Mr. Quigley, speaking for the board, advised them that there was too much difference be- [fol. 374] tween $55,800 and $70,400 and that the building was worth approximately $90,000, and that the difference between the $70,400 and the value of the building, approximately $90,000, would take care of the depreciation.

Mr. Quigley further testified that he told Mr. Fuller the Board would not settle for that amount but they would be glad for the defendant companies to reconstruct the building and to put it back like it was, and that that would satisfy the plaintiff. He further states that Mr. Fuller advised he had been in the insurance business many years, and had never reconstructed a building and did not intend to. The substance, according to the plaintiff's testimony, of the meeting was that the proposition of settlement was made and the plaintiff declined it on the ground that it was inadequate and was not a fair valuation of the property destroyed at the time of the fire. Mr. Fuller testified that he had sufficient information at the time that he made the proposition to properly determine the value of the building destroyed. He further testified that he did not make a proposition to pay so much, but advised the board if they would accept that amount he would prepare proofs of loss, and submit it to the companies advising settlement on that basis. He furthere [further] testified that he had employed Mr. Cabelman [Kebelman] for the purpose of making an estimate as to the reproduction cost of the building destroyed.

Mr. Cabelman [Kebelman] testified that he was employed by Mr. Fuller, that the plans and specifications were delivered to him by Mr. Fuller, and in addition to this, he went to Mr. Fisher who had prepared the plans and specifications, and was superintendent of construction on the new building, and got all the information he could from him;

that he also inspected the building after it was destroyed and that he had sufficient information to enable him to make a proper estimate and determine the cost of the reconstruction of the building.

This is substantially the evidence that was introduced relative to the information which was furnished to the defendants or procured by them as a basis for their calculation of the actual cash or sound value of the property destroyed by fire, but you gentlemen will be depended upon to remember the evidence as actually introduced. The court is merely reviewing this for your benefit, but you are not bound by any statement of the evidence as made by the court, but will *he* required to depend upon your own memories and the exhibits introduced to remember the evidence. [fol. 375] As to the value of the building destroyed, the evidence is contradictory. Your attention is called particularly to the evidence of G. E. Autry, who built the old building, and to the evidence of L. L. Hitt, who built the new building or the addition, who testified on behalf of the plaintiff. Witness Autry testified that he built the old building in the year 1917 and '18; that it was built of first class material; that the architec*ht*'s [architect's] estimate was approximately $55,000; and that it actually cost to construct between $50,000 and $55,000. He further testified that the value of the building at the time of the fire in his opinion was approximately $53,000.

Witness Hitt testified that he constructed the new building or the addition according to plans and specifications; that the contract was let to the lowest bidder and was awarded to him; that the actual cost of the construction of the new building was $58,000; that in addition he received approximately $6,000 for changes on the old building and work on the old building to make it correspond to the new building, and that after the new building was completed that the joint building was valued by him as follows: new building, $58,000; old building, $44,000, or a total of $102,000. That, of course, was in 1923 or '24 at the time the new building was constructed.

He further testified that allowing for depreciation, the value of the building at the time of the fire was in excess of $88,000, and he so advised the board at the time this insurance was written by the defendant company.

There was other testimony offered by the plaintiff relative to the value of the building, but it was not so positive as the testimony of the two contractors and less in detail.

On behalf of the defendants the evidence shows that from the plans and specifications and from the information procured on which they based their estimates, that the value of the building at the time of the fire was approximately $50,692.00 and that the value of all of the property destroyed by fire was $55,800, or it had an actual cash or sound value of that amount.

The court instructs you that there are three proportions involved in the trial of these cases, to-wit:

First. Was the action brought within the statute of limitations? The court has ruled on that matter, holding that the actions were brought within the statute of limitations [fol. 376] and since that is a question of law it is not a matter to be submitted to you for your determination.

Second. Did the defendants waive the filing by the plaintiff of the proof of loss, and if they did, are they now estopped from setting up the failure of the plaintiff to file the proof of loss as a bar to plaintiff's recovery?

Third. What was the actual cash value or sound value of the property destroyed by fire on the day of the fire?

The court further instructs you as to the law as follows:

No. 1. "Clauses in insurance policies prohibiting waiver, unless the same is endorsed thereon, refer only to the provisions which enter into the contract of insurance, and they do not affect conditions which are to be performed after loss such as furnishing proofs of loss and giving notice. These may be waived either by expressed words or by conduct inconsistent with an intention to enforce a strict compliance with the conditions, and which conduct is calculated to lead the insured to believe that the insured does not intend to require such compliance."

I give you here some requested instructions requested by the plaintiff, as follows:

No. 2

"You are instructed that the provision in each of the insurance policies involved in these actions requiring the in-

sured in the event of a loss by fire to within sixty days from the date of such fire, furnish to the insurance company a proof of loss in the manner provided and specified in such policies is a provision for the benefit of the insurance company, and which provi*di*sion [provision] may be waived by the insurance company by acts or conduct of its duly authorized agent, or agents."

No. 4

"You are instructed that a waiver may be either express or implied. An express waiver is governed by its terms—an implied wi*a*ver [waiver] is where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive the provision or right in question, or where the conduct pursued is inconsistent with any other honest intention than in intention to waive the provision or right, and the other party has been induced by such conduct to act or fail to act."

[fol. 377] No. 5

"You are instructed if you find from the evidence that the conduct of the defendants by and through their adjusters was such as was calculated to mislead a reasonably prudent person in regard to the provision in said policies requiring the insured to furnish to the defendants a proof of loss, that is such as to lead such a person to believe that the defendants had all of the information they desired, and that they would not require the plaintiff to furnish such proof of loss in the form and manner as prescribed by said insurance policies, and that such conduct on the part of the defendants did so mislead the plaintiff, then such conduct would be sufficient to constitute a waiver by the defendants of the provision in said policies requiring the plaintiff to furnish proof of loss and would excuse the plaintiff from furnishing the same, and would, also estop the defendants from asserting such provision of the policies as a defense in these actions."

No. 6

"You are instructed that if from the evidence you find that the plaintiff substantially complied with the provisions

of the policies requiring the furnishing of proof of loss, or if you find that such provision of the policies has been waived by the defendants, or that the defendants are now estopped to asse-t [assert] such provision as a defense in these actions, then you are instructed that your verdicts in these actions should be in favor of the plaintiff and against the defendants for such sums as you may find from the evidence and the instructions of the court, the plaintiff is entitled to recover."

No. 7

You are instructed that in arriving at your verdicts in the event you find the plaintiff entitled to recover, that the total amount of the plaintiff's recovery against all of the defendants combined shall be for such sums as you find to be the reasonable fair cash value of the property destroyed at the time of its destruction, not to exceed, however, in any event the total amount of all of the insurance upon such property.

No. 8

If you find the issues in favor of the plaintiff and that it is entitled to recover in any sum whatsoever you shall then determine the amount of your verdict as to each defendant. In this connection you are instructed that the total amount of insurance upon the school building and the permanent fixtures attached thereto and forming a [fol. 378] part thereof was $66,999.99, and the total amount of insurance upon the movable furniture and equipment in said school building, that is, furniture and equipment that was not fastened to and forming a part of said building, was $3,399.99. If you find that plaintiff's loss upon said building and permanent fixtures was equal to, or greater than, the total insurance thereon, and that its loss upon said movable furniture and equipment was equal to, or greater than the total insurance thereon, then your verdicts should be in favor of the plaintiff and against each defendant for the amounts such defendants are sued for.

In this connection, you are further instructed that if you find plaintiff's loss upon said building and permanent fixtures was less than the total insurance thereon, then it will

be your duty to determine the amount of such loss and pro-rate it among the defendants in the manner hereinafter provided, and if you find plaintiff's loss upon said movable furniture and equipment was less than the total insurance thereon, then it will be your duty to determine the amount of such loss and pro-rate it among the defendants in the manner hereinafter provided.

In the event you find it necessary to pro rate any loss, as above provided, then you are instructed that the insurance carried by each of the defendants upon the property involved is as follows:

Royal Insurance Company, Ltd.:	
On building and permanent fixtures	$16,500.00
Upon movable furniture and equipment (Nil).	
The National Fire Insurance Company:	
On building and permanent fixtures	5,833.33
On movable furniture and equipment	1,333.33
Fire Association of Philadelphia:	
On building and permanent fixtures	22,333.33
On movable furniture and equipment	1,333.33
Concordia Insurance Company:	
On building and permanent fixtures	22,333.33
On movable furniture and equipment	1,333.33

In the event it becomes necessary for you to pro-rate among the defendants any loss on the building and permanent fixtures, as hereinabove provided, then you shall pro-rate it among the defendants and render your verdict against the defendants upon the following basis:

[fol. 379] Your verdict against the defendant Royal Insurance Company, Ltd., on account of any loss sustained on said building and permanen*t* [permanent] fixtures should be for proportion of said loss as $16,500.00 bears to $66,999.99.

Your verdict against the defendant, The National Fire Insurance Company, on account of any loss sustained on said building and permanent fixtures should be for such proportion of said loss as $5,833.33 bears to $66,999.99.

Your verdict against the defendant, The Fire Association of Philadelphia, on account of any loss sustained on said building and permanent fixtures should be for such proportion of said loss as $22,333.33 bears to $66,999.99.

Your verdict against the defendant, Concordia Insurance Company, on account of any loss sustained on said building and permanent fixtures should be for such proportion of said loss as $22,333.33 bears to $66,999.99.

If you find it necessary to pro-rate plaintiff's loss upon the movable furniture and equipment, as hereinbefore provided, then you shall pro-rate such loss among the defendants and render your verdict against each of the following defendants for their proportionate part of said loss upon the following basis:

Against the National Fire Insurance Company for such proportion of said loss upon the movable furniture and equipment as $1,133.33 bears to $3,399.99.

Against Fire Association of Philadelphia for such proportion of said loss upon the movable furniture and equipment as $1,133.33 bears to $3,399.99.

Against Concordia Insurance Company for such proportion of said loss upon the movable furniture and equipment as $1,133.33 bears to $3,399.99.

The court further instructs you if, however, you should believe from the evidence that the plaintiff failed to file a proof of loss as provided in the policy within sixty days after the fire, and that the defendants did not expressly or by implication or by their acts waive their right to the proof of loss, then and in that event you shall find for the defendants. In other words, before you can find a verdict for the plaintiff in any sum you must first find from the evidence that there has been a waiver by the defendants of their right to the proof of loss as provided in the policy.

On the other hand, if you find from the evidence, that the plaintiff thourgh [through] its agents or representa- [fol. 380] tives furnished to the defendant the plans and specifications which they possessed, and they furnished a complete list of all of the equipment, movable or otherwise, destroyed by fire, and they also furnished the defendants all such available information as they had as to the actual value of the property destroyed, and that the defendants, through the insurance adjusters, advised the plaintiff or its representatives that said defendants had sufficient information to enable them to arrive at a proper valuation of the property destroyed at the time of the fire, and if you further find from the acts of said adjusters that

the plaintiffs were led to believe and did believe that they had furnished all of the necessary information to enable the defendants to reach a proper estimate of the cash value of the property destroyed by fire, then and in that event, the said acts of said adjusters constituted a waiver, and the defendants would be estopped from setting up the failure of the plaintiff to provide such proof of loss as a bar to recovery in this action.

You are instructed that if you find from the evidence that the adjusters in this case represented the defendant companies, then the plaintiff had a right to believe that in dealing with such adjusters it was dealing with the duly authorized representatives of the defendant companies, then the representations and acts of said adjusters will be considered binding upon said defendant companies.

You are further instructed that there has been evidence introduced to the effect that the adjusters produced one Mr. Cabelman [Kebelman] a contractor who agreed in the presence of the plaintiff board members that he would reconstruct the building for the sum suggested as a settlement by Mr. Fuller, the adjuster; but you are further instructed that the school board was not bound by any such offer, that it could only enter into a contract for the construction of a building after complying with the statutory provisions which would require, first, the adoption of plans and specifications advertising for bids and letting the contract to the lowest and best bidder, and that said evidence was admitted not on the theory that the proposition was binding on the plaintiff, but was admitted merely as a circumstance entering into the determination of the fair cash or sound value of the property destroyed at the time of the fire.

You are further instructed that under the terms of the policies the defendants had a right to reconstruct said building if they so desired, and that if you find from the evidence that the plaintiff in these cases is entitled to recover the fair cash value of the buildings destroyed by fire, that [fol. 381] then and in that event the defendant companies had a right either to reconstruct said building or to pay the plaintiff the fair cash value of said property so destroyed at the time of the fire.

You are the sole judges of the facts in these cases, and you alone must be depended upon to pass upon the weight

of the evidence and the credibility of the witnesses. You should consider how they have impressed you upon the witness stand, what interest they have had in the result of the trial and whether their testimony is reasonable or not; how they have recollected or failed to recollect the material facts which they have testified to, and you should consider all of the evidence in the light of the established facts and circumstances.

In arriving at the facts, it will be proper for you to consider how the witnesses have impressed you, their means of knowledge and the state of their recollection, whether they have been influenced by any interest in the result of the trial or other motive or by any bias, favoritism or hostility toward either side, whether their testimony is reasonable, and whether it is sustained or discredited by other testimony or the facts and circumstances shown in the case. When you find the facts truly and impartially in accordance with your conscientious convictions and faithfully apply the law as declared by the court, then your duty will have been rendered in this case.

You should, with patience and deference toward each other, mutually consider the evidence and facts and circumstances shown. You will be thoughtful and diligent in the consideration of the interests committed to your care. The facts have not been in your keeping and you are not responsible for them.

When you retire you will select one of your number as foreman to preside over your deliberations and sign your verdict. It is necessary that you all agree on the result. In this court there is no majority verdict.

Forms of verdict will be furnished to you for your use, and when you arrive at a verdict, you will return it into court.

Gentlemen, in reaching a verdict in this case you will not take into consideration the question of interest if you find for the plaintiff. That is a matter that will be determined by the Court as a matter of law and there is one other matter that occurs to the Court: In reaching your verdict if you find for the plaintiff you may also take into [fol. 382] consideration the fact that there was $200.00 worth of salvage. I think that was not specifically mentioned in my instructions.

By the Court: Gentlemen, are there any exceptions.

EXCEPTIONS TO CHARGE

Mr. Thurman: The defendants each except to that portion of the Court's charge to the jury on page six in the sentence beginning "The theory of the defense is", and ending "recover under the policy", for the reason that the Court tells the jury that it is the theory of the defense that the failure of the plaintiff to make or submit proof of loss within the 60-day period following the fire would cause the plaintiffs to forfeit their rights to recover under the policy, while it has been the theory of the defendants that the failure to file a proof of loss resulted in the action being prematurely commenced.

Mr. Thurman: Each of the defendants except to that portion of the charge to the jury beginning on page 6, with the words, "The uncontradicted testimony is that the policies sued on" and ending on page 9, with the words, "and determine the cost of the reconstruction of the building," for the reason that there is no evidence supporting the statements of the substance of this testimony.

By the Court: Exception allowed.

Each of the defendants except to that portion of the Court's charge commencing on page 9, with the words, "As to the value of the building destroyed," and ending on page 10, with the words "or it had an actual cash or sound value of that amount," for the reason that the evidence introduced does not support the conclusions stated.

By the Court: Exception allowed.

Mr. Thurman: Each of the defendants except to that portion of the Court's charge on page 11, commencing with the word "Second" and ending with the words "plaintiffs recover" for the reason that under the terms of the contract sued on there was no evidence of a waiver of the making or giving of the proof of loss or estoppel of the defendants or either of them to rely upon such provisions of the policy.

By the Court: Exception allowed.

Mr. Thurman: Each of the defendants except to that portion of the Court's charge on page 11, marked No. 1, [fol. 383] for the reason that the same is contrary to and in disregard of the provisions of the written contract sued on, and is contrary to the law applicable thereto.

By the Court: Exception allowed.

Mr. Thurman: Each of the defendants except to that portion of the Court's charge on page 11 and marked No. 2, for the same reason as given to No. 1.

By the Court: Exception allowed.

Mr. Thurman: The same exception as to No. 4 on page 12 and No. 5 on page 12, and No. 6 on page 12.

Mr. Thurman: Each of the defendants except to that portion of the Court's charge on page 16 beginning with the words "The Court further instructs you if, however, you should believe from the evidence that the plaintiff failed to file proof of loss—" all of that paragraph for the reason that the same is contrary to the express provisions of the policy contracts sued on, in that the Court tells the jury that the provision of the contract with reference to the making of the proof of loss can be waived by implication; and for the further reason the same invades the province of the jury, and for the additional reason that the evidence referred to and the purported facts stated would not in law constitute a waiver of the filing of proof of loss or estoppel of the defendants to require the same.

By the Court: Exception allowed.

Mr. Thurman: Each defendant excepts to that portion of the Charge commencing on page 16 with the words, "On the other hand if you find from the evidence" and ending "bar to a recovery in this action," for the same reason given first above.

By the Court: Exception allowed.

Mr. Thurman: Each defendant excepts to that portion of the Court's charge beginning at the bottom of page 16 with the words "You are instructed that" and ending with

the words "binding upon such defendant companies" for the same reason.

By the Court: Exception allowed.

(Thereupon, the jury retires to consider its verdict.)

[fol. 384] Prayer for Approval of Bill of Exceptions

And now in furtherance of justice and that right may be done, the defendants above named, present the foregoing as and for their bill of exceptions in the above entitled cause and pray that the same be settled, allowed, signed and filed as such.

Rittenhouse, Lee, Webster & Rittenhouse, by Frank E. Lee, H. C. Thurman, Attorneys for Defendants.

Approval of Bill of Exceptions by Counsel for Plaintiff

We have examined the said bill of exceptions in the above entitled cause and have no suggestions or amendments to offer thereto and hereby consent that said bill of exceptions may be presented to the Honorable Edgar S. Vaught, presiding and trial judge, at any time and place, and without further notice to us.

Chester H. Lowery, Rainey, Flynn, Green & Anderson, Attorneys for Plaintiff.

In United States District Court

Order Approving Bill of Exceptions

Now on this 20th day of April, 1929, and within the time allowed by the order of the court for the presentation and filing by the defendants of their bill of exceptions, come the defendants above named by their attorneys and present to the Honorable Edgar S. Vaught, the judge who presided at the trial of said cause, the foregoing bill of exceptions, and pray that the same may be settled, allowed,

signed and ordered filed as a part of the record in said cause, which is accordingly done.

Edgar S. Vaught, United States District Judge, Western District of Oklahoma.

[File endorsement omitted.]

[fol. 385] In United States District Court

Order Consolidating Causes—Filed Mar. 15, 1929

It is this day ordered for good cause shown that the above entitled and numbered causes be and they are consolidated for the purpose of appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

March 15th, 1929, Oklahoma City, Oklahoma.

Edgar S. Vaught, District Judge.

[File endorsement omitted.]

In United States District Court

No. 3473. Law

Petition for Appeal.—Filed April 3, 1929

To the Honorable Edgar S. Vaught, District Judge:

The above named defendant, The Concordia Fire Insurance Company of Milwaukee, a corporation, sued herein as Concordia Insurance Company of Milwaukee, a corporation, being aggrieved by the judgment entered and rendered in the above entitled cause on the 18th day of January, 1929, against it and in favor of School District No. 98 of Payne County, State of Oklahoma, plaintiff, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Tenth Circuit, for the reasons set forth in the assignments of errors filed herewith, and defendant prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was

based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Tenth Circuit, under the rules of such Court in such cases made and provided.

Your petitioner further prays that proper order relating to the required security to be required of it, and also to supersede such judgment may be made.

H. C. Thurman, Counsel and Attorney for Defendant The Concordia Fire Insurance Company of Milwaukee, a Corporation.

[File endorsement omitted.]

[fol. 386] In United States District Court

No. 3473. Law

Assignment of Errors—Filed April 3, 1929

Now on this 3rd day of April, 1929, comes The Concordia Fire Insurance Company of Milwaukee, a corporation, defendant, sued in the above entitled cause as Concordia Insurance Company of Milwaukee, a corporation, and files the following assignment of errors upon which it will rely in its prosecution of the appeal in the above entitled cause from the judgment made and entered by this Honorable Court on January 18, 1929, against this defendant, and in favor of School District No. 98 of Payne County, State of Oklahoma, and says that said judgment is erroneous and against the just rights of this defendant for the following reasons:

I

Said court erred in overruling the demurrer of said defendant to the amended petition of the plaintiff, to which ruling of the court defendant then and there excepted and its exception was allowed; said ruling of the court being erroneous for the reason that said amended petition did not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant in that it did not allege the furnishing of the sworn statement or proof of loss, or a written waiver thereof, as required by the provisions of

the written contract or policy of insurance sued upon by plaintiff.

II

Said court erred in overruling the objection of the defendant to the introduction of any evidence in said cause, to which ruling of the court the defendant then and there excepted and its exception was allowed; said ruling of the court being erroneous for the reason that the pleadings of plaintiff did not state a cause of action against the defendant in that said pleadings failed to allege either that plaintiff had furnished to defendant in writing the sworn statement or proof of loss required to be furnished by the written contract or policy of insurance sued upon by plaintiff, or a waiver thereof by defendant in writing, as provided for in said written contract or policy of insurance; said sworn statement or proof of loss being required by said contract or policy to be so furnished or so waived before plaintiff could institute or maintain this action.

III

Said court erred in admitting incompetent, irrelevant and immaterial testimony and evidence on behalf of the plain-
[fol. 387] tiff over the objection of the defendant, to which, in each instance, the defendant then and there duly excepted and its exceptions were allowed, in permitting the witness, V. I. Langston, to testify to an alleged conversation between said witness and Guy H. Fuller and George W. Kline, alleged adjusters for the insurance companies interested in the loss complained of by plaintiff, and to things done subsequent to said alleged conversation, all of which testimony and evidence was offered and allowed to be introduced for the purpose of proving or attempting to prove an oral waiver of the provisions of the contract or policy of insurance sued upon by plaintiff providing that plaintiff was required to furnish a sworn statement in proof of loss before it could maintain any action upon said contract or policy for any loss or damage to the property covered by said contract or policy, unless there had been a waiver in writing of such sworn statement in proof of loss as provided for in said contract or policy; and in permitting said witness, V. I. Langston, and the witnesses J. E.

Quigley and P. E. Perswell, to testify to conversations and happenings at a certain alleged meeting between the members of the School Board of plaintiff and the alleged adjusters for the insurance companies, to-wit, Guy H. Fuller, Lloyd J. Mullen and George W. Kline, on the 27th day of February, 1926, all of which testimony was offered and received for the purpose of varying or attempting to vary said provisions of said written contract or policy of insurance relating to the furnishing of such sworn statement in proof of loss; and in permitting plaintiff to introduce evidence as to the cost price of the old part of the school building involved in this cause which had been constructed many years prior to the alleged loss and had been remodeled, such evidence being of facts too remote to have any probative value and which could only serve to confuse or form the basis of speculation or conjecture on the part of the jury.

IV

That the court erred in admitting any evidence whatsoever offered and admitted for the purpose of showing that defendant, by any act other than in writing as provided in said contract or policy of insurance, waived the proof of loss or sworn statement relating to the loss required to be furnished by plaintiff to defendant under the terms of said written contract or policy of insurance sued upon by plaintiff herein before plaintiff could institute or maintain this action, to which action of the court in each instance the defendant at the time duly excepted and its exceptions were allowed.

[fol. 388]

V

That the court erred in rejecting competent, relevant and material testimony and evidence offered on behalf of the defendant, to which action of the court the defendant in each instance then and there duly excepted, and its exceptions were allowed.

VI

That said court erred in overruling the demurrers of the defendant to the evidence of the plaintiff for the reason that said evidence wholly failed to establish facts sufficient

to entitle the plaintiff to recover judgment against the defendant in any sum, to which action of the court the defendant duly excepted and its exception was allowed.

VII

Said court erred in overruling and denying the motion and request of defendant for an instruction by the court to the jury to return a verdict in favor of the defendant at the close of all of the evidence in said cause for the reason that said evidence showed that the defendant was not entitled to recover against the defendant in any sum, to which ruling of the court the defendant duly excepted at the time, and its exception was allowed.

VIII

Errors of the court in giving to the jury those portions of the court's charge numbered "1", "2", "3", "4", "5", "6" and "7", and to those other portions of the charge to the jury, to which defendant specifically excepted at the time, and each of its said exceptions was by the court allowed.

IX

That the court erred in the charge of the court to the jury in stating that it was the theory of the defendant that by reason of the plaintiff's having failed to furnish the sworn statement or proof of loss required by the terms of the policy contract, the plaintiff had forfeited all of its rights under such policy, to which portion of said charge the defendant duly excepted at the time and its exception was allowed.

X

That the court erred in the charge of the court to the jury in that in said charge, the court invaded the province of the jury as specifically called to the attention of the court in the exceptions of this defendant to the charge of the court and the different portions thereof, in that the [fol. 389] court therein erroneously set forth the evidence of facts which the court told the jury constituted a waiver of said sworn statement or proof of loss, to which action of

the court the defendant at the time excepted and its exception was allowed.

XI

That the verdict of the jury in said cause is not supported by any evidence and is contrary to the evidence and contrary to law, to which verdict, and the receiving, filing and recording of same defendant duly excepted at the time, and its exception was allowed.

XII

That the court erred in rendering judgment upon said verdict and in said cause against the defendant for the reason that said verdict and judgment are not supported by any evidence, are contrary to the evidence and are contrary to law.

XIII

That the court erred in rendering judgment against defendant for interest upon the amount of said Judgment from May 2, 1926, for the reason that said portion of said judgment is contrary to law, there being no provision in the policy or contract of insurance sued upon by plaintiff herein whereby it was either expressly or impliedly agreed that interest should be paid and the claim of plaintiff in this cause being an unliquidated claim, it could not be liquidated by mere calculation and required the verdict of a jury or the judgment of a court to determine the amount of same.

Wherefore the defendant and appel [appellant] prays that said decree be reversed and that said District Court for the Western District of Oklahoma be ordered to enter a decree reversing said judgment of said lower court in said cause, and that defendant have all other proper relief.

H. C. Thurman, Counsel and Attorney for The Concordia Fire Insurance Co. of Milwaukee.

[File endorsement omitted.]

In United States District Court

No. 3473. Law

Order Allowing Appeal and Fixing Bond—Filed Apr. 3, 1929

On a motion of H. C. Thurman, counsel and attorney for defendant, The Concordia Fire Insurance Company of Mil- [fol. 390] waukee, a corporation, sued herein as Concordia Insurance Company of Milwaukee, a corporation,

It Is Hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment heretofore filed and entered herein be, and the same is hereby allowed, and that certified copy of the transcript of the record, testimony, exhibits, stipulations, and all proceedings, be forthwith transmitted to said United States Circuit Court of Appeals for the Tenth Circuit.

It Is Further Ordered that the bond on appeal and as a supersedeas be fixed in the sum of Fifty Thousand ($50,000.00) Dollars; that said appeal having been allowed and said defendant having executed bond in the sum of Fifty Thousand ($50,000.00) Dollars, as provided by law,

It Is Ordered that the same shall operate as a supersedeas, and that said judgment is superseded.

Dated at Oklahoma City, Oklahoma, in said District April 3rd, 1929.

Edgar S. Vaught, Judge of the United States District Court for the Western District of Oklahoma.

[File endorsement omitted.]

(Bond of supersedeas and appeal in the sum of $50,000, with Concordia Insurance company of Milwaukee as principal and Fidelity & Deposit company of Maryland as surety, was given on the third day of April, A. D. 1929, and on the same day said bond was approved by Edgar S. Vaught, district judge.)

IN UNITED STATES DISTRICT COURT

No. 3481. Law

PETITION FOR APPEAL—Filed Mar. 26, 1929

To the Honorable Edgar S. Vaught, District Judge:

The above named defendant, Royal Insurance Company, Ltd., a corporation, being aggrieved by the judgment entered and rendered in the above entitled cause on the 18th day of January, 1929, against it and in favor of School District No. 98 of Payne County, State of Oklahoma, plaintiff, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the assignments of error filed herewith, and defendant prays that its appeal be allowed, and that citation be issued as provided by law, and that a tran-
[fol. 391] script of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of such Court in such cases made and provided.

Your petitioner further prays the proper order relating to the required security to be required of it and also to supersede such decree be made.

F. A. Rittenhouse, John F. Webster, Frank E. Lee, Counsel and Attorneys for Defendant Royal Insurance Company, Ltd.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 3481. Law

ASSIGNMENT OF ERRORS—Filed Mar. 26, 1929

Now on this 26th day of March, 1929, comes the Royal Insurance Company, Ltd., a corporation, defendant in the above entitled cause, and files the following assignment of errors which it will rely upon in its prosecution of the appeal in the above entitled cause from the decree made by

this Honorable Court on January 18, 1929, against this defendant and in favor of School District No. 98 of Payne County, State of Oklahoma, and says that said decree is erroneous and against the just rights of this defendant for the following reasons:

(Omitted: Errors assigned, they being identical with those assigned in state case No. 3473, School District No. 98, etc. vs. Concordia Insurance Company, and printed herewith.)

Wherefore the defendant and appellant prays that said decree be reversed and that said District Court for the Western District of Oklahoma be ordered to enter a decree reversing said judgment of said lower court in said cause, and that defendant have all other proper relief.

F. A. Rittenhouse, John F. Webster, Frank E. Lee,
Counsel and Attorneys for Defendant.

[File endorsement omitted.]

[fol. 392] In United States District Court

Order Allowing Appeal and Fixing Bond—Filed Mar. 26, 1929

No. 3481. Law

On motion of Frank E. Lee, counsel and attorney for defendant, Royal Insurance Company, Ltd.,

It is Hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore filed and entered herein be and the same is hereby allowed, and that certified copy of the transcript of the record, testimony, exhibits, stipulations, and all proceedings, be forthwith transmitted to said United States Circuit Court of Appeals for the Eighth Circuit.

It Is Further ordered that the bond on appeal and as a supersedeas be fixed in the sum of $20,000; that said appeal having been allowed and said defendant having executed bond in the sum of $20,000.00 as provided by law,

It Is Ordered that the same shall operate as a supersedeas, and that said decree is superseded.

Dated at Oklahoma City, Oklahoma, in said District March 26, 1929.

Edgar S. Vaught, Judge United States District Court for the Western District of Oklahoma.

(Bond of supersedeas and appeal in the sum of $20,000, with Royal Insurance company as principal and Constitution Indemnity company of Philadelphia as surety, was given on the 25th day of March, A. D. 1929, and on the 26th day of March, A. D. 1929, said bond was approved by Edgar S. Vaught, district judge.)

In United States District Court

No. 3482. Law

Petition for Appeal—Filed Mar. 26, 1929

To the Honorable Edgar S. Vaught, District Judge:

The above-named defendant, National Fire Insurance Company, a corporation, being aggrieved by the judgment entered and rendered in the above entitled cause on the 18th day of January, 1929, against it and in favor of School District No. 98 of Payne County, State of Oklahoma, plaintiff does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the assignments of error filed here-[fol. 393] with, and defendant prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of such Court in such cases made and provided.

Your petitioner further prays the proper order relating to the required security to be required of it and also to supersede such decree be made.

F. A. Rittenhouse, John F. Webster, Frank E. Lee, Counsel and Attorneys for Defendant National Fire Insurance Company.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 3482. Law

ASSIGNMENT OF ERRORS—Filed Mar. 26, 1929

Now on this 26th day of March, 1929, comes the National Fire Insurance Company, a corporation, defendant in the above entitled cause, and files the following assignment of errors which it will rely upon in its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on January 18, 1929, against this defendant and in favor of School District No. 98 of Payne County, State of Oklahoma, and says that said decree is erroneous and against the just rights of this defendant for the following reasons:

(Omitted: Errors assigned, they being identical with those assigned in state case No. 3473, School District No. 98, etc. vs. Concordia Insurance company; and printed herewith.)

Wherefore, the defendant and appellant prays that said decree be reversed and that said District Court for the Western District of Oklahoma be ordered to enter a decree reversing said judgment of said lower court in said cause, and that defendant have all other proper relief.

F. A. Rittenhouse, John F. Webster, Frank E. Lee,
Counsel and Attorneys for Defendant.

[File endorsement omitted.]

[fol. 394] IN UNITED STATES DISTRICT COURT

No. 3482. Law

ORDER ALLOWING APPEAL AND FIXING BOND—Filed Nov. 26, 1929

On motion of Frank E. Lee, counsel and attorney for defendant, National Fire Insurance Company,

It Is Hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the

judgment heretofore filed and entered herein be and the same is hereby allowed, and that certified copy of the transcript of the record, testimony, exhibits, stipulations, and all proceedings, be forthwith transmitted to said United States Circuit Court of Appeals for the Eighth Circuit.

It Is Further Ordered that the bond on appeal and as a supersedeas be fixed in the sum of $10,000.00; that said appeal having been allowed and said defendant having executed bond in the sum of $10,000.00 as provided by law,

It Is Ordered that the same shall operate as a supersedeas, and that said decree is superseded.

Dated at Oklahoma City, Oklahoma, in said District, March 26, 1929.

Edgar S. Vaught, Judge United States District Court, Western District of Oklahoma.

[File endorsement omitted.]

(Bond of supersedeas and appeal in the sum of $10,000, with National Fire Insurance company as principal and Constitution Indemnity company of Philadelphia as surety, was given on the 25th day of March, A. D. 1929, and on the 26th day of March, A. D. 1929, said bond was approved by Edgar S. Vaught, district judge.)

In United States District Court

No. 3483. Law

Petition for Appeal—Filed Mar. 26, 1929

To the Honorable Edgar S. Vaught, District Judge:

The above named defendant, Fire Association of Philadelphia, a corporation, being aggrieved by the judgment entered and rendered in the above entitled cause on the 18th day of January, 1929, against it and in favor of School District No. 98 of Payne County, State of Oklahoma, plaintiff does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, [fol. 395] for the reasons set forth in the assignments of error filed herewith, and defendant prays that its appeal

be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of such court, in such cases made and provided.

Your petitioner further prays the proper order relating to the required security to be required of it and also to supersede such decree be made.

F. A. Rittenhouse, John F. Webster, Frank E. Lee, Counsel and Attorneys for Defendant Fire Association of Philadelphia.

[File endorsement omitted.]

In United States District Court

No. 3483. Law

Assignment of Errors—Filed Mar. 26, 1929

Now on this 26th day of March, 1929, comes the Fire Association of Philadelphia, a corporation, defendant in the above entitled cause, and files the following assignment of errors which it will rely upon in its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on January 18, 1929, against this defendant and in favor of School District No. 98 of Payne County, State of Oklahoma, and says that said decree is erroneous and against the just rights of this defendant for the following reasons:

(Omitted: Errors assigned, they being identical with those assigned in state case No. 3473, School District No. 98, etc. vs. Concordia Insurance Company, and printed herewith.)

Wherefore, the defendant and appellant prays that said decree be reversed and that said District Court for the Western District of Oklahoma be ordered to enter a decree reversing said judgment of said lower court in said cause, and that defendant have all other proper relief.

F. A. Rittenhouse, John F. Webster, Frank E. Lee, Counsel and Attorneys for Defendant.

[File endorsement omitted.]

[fol. 396] In United States District Court

No. 3483. Law

Order Allowing Appeal and Fixing Bond—Filed Mar. 26, 1929

On motion of Frank E. Lee, counsel and attorney for defendant, Fire Association of Philadelphia,

It Is Hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore filed and entered herein be and the same is hereby allowed, and that certified copy of the transcript of the record, testimony, exhibits, stipulations, and all proceedings, be forthwith transmitted to said United States Circuit Court of Appeals for the Eighth Circuit.

It Is Further Ordered that the bond on appeal and as a supersedeas be fixed in the sum of $30,000.00; that said appeal having been allowed and said defendant having executed bond in the sum of $30,000.00, as provided by law,

It Is Ordered that the same shall operate as a supersedeas and that said decree is superseded.

Dated at Oklahoma City, Oklahoma, in said District, March 26, 1929.

Edgar S. Vaught, Judge of the United States District Court of Western District — Oklahoma.

[File endorsement omitted.]

(Bond of supersedeas and appeal in the sum of $30,000 with Fire Association of Philadelphia as principal and Constitution Indemnity company of Philadelphia as surety, was given on the 25th day of March, A. D. 1929, and on the 26th day of March, A. D. 1929, said bond was approved by Edgar S. Vaught, district judge.)

In United States District Court

Præcipe for Transcript of Record—Filed May 6, 1929

The appellees are notified that the appellants filed with the Clerk of the above Court this præcipe specifying the record to be incorporated on appeal in this case:

1. The pleadings, including the petitions, demurrers, answers and replies, and record on removal as shown by the transcript sent up from the State Court.
2. All motions filed and all orders of the Court ruling thereon.

[fols. 397 & 398] 3. The bill of exceptions, including all evidence introduced in the trial of said consolidated cases.

4. The complete charge of the court to the jury.
5. All requested charges of the court to the jury refused by the Court.
6. The verdicts of the jury.
7. The judgment and decree of the Court.
8. The motions of the appellants for new trial.
9. The orders of the Court overruling said motions.
10. The petitions for appeal and orders allowing same, and bonds.
11. The specifications of error.
12. The citations and services.
13. All other orders and proceedings of the Court touching said causes, and the extensions of time for filing record in the Circuit Court of Appeals.

And appellants elect to have the entire of said record printed for filing in the Circuit Court of Appeals.

F. A. Rittenhouse, Frank E. Lee, John F. Webster, H. C. Thurman, Solicitors and Attorneys for Appellants.

Service of the foregoing præcipe acknowledged this 6th day of May, 1929, and we hereby waive the suggestion and waive notice of time to suggest that any additional matters be incorporated in the record.

Chester H. Lowery and Rainey, Flynn, Green & Anderson, Solicitors and Attorneys for Appellees.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 399] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

ORDER EXTENDING TIME—Filed Sept. 14, 1929

Order

It is this day ordered, for good cause shown, that the time in which the said appellants may docket said case and file a transcript of the record herein, in the United States Circuit Court of Appeals be and the same is extended to July 24, 1929.

May 25, 1929.

Edgar S. Vaught, U. S. District Judge.

[File endorsements omitted.]

Order

It is this day ordered, for good cause shown, that the time in which the said appellants may docket said case and file a transcript of the record herein, in the United States District Court of Appeals be and the same is extended to September 24, 1929.

Edgar S. Vaught, U. S. District Judge.

July 22, 1929.

Appearances of counsel omitted in printing.

[fol. 400] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION TO STRIKE—Filed Nov. 26, 1929

Comes now School District No. 98 of Payne County, State of Oklahoma, appellee, and respectfully moves this Honorable Court to strike from the transcript of the record the purported bill of exceptions printed therein, which is merely a verbatim copy of everything that occurred at the trial.

Chester H. Lowry, Streeter B. Flynn, Rainey, Flynn, Green & Anderson, Frank G. Anderson, Oklahoma City, Oklahoma, Attorneys for Appellee.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

Before Honorable Robert E. Lewis, Honorable Orie L. Phillips, and Honorable George T. McDermott, Circuit Judges

ORDER GRANTING MOTION TO STRIKE--Dec. 9, 1929

This cause came on to be heard on the motion of appellee to strike from the transcript of the record in this cause the purported bill of exceptions printed therein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said motion be and the same is hereby [fol. 401] granted and that the said purported bill of exceptions is hereby stricken from the transcript of the record from the said District Court.

It is further ordered by the court that this cause be and the same is hereby assigned for hearing, on any questions which do not require a consideration of the purported bill of exceptions, for Monday, February 3, 1930, at Guthrie, Oklahoma.

Orders of submission February 3, 1930, omitted in printing.

[fol. 402] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, FEBRUARY TERM, 1930

Appeals from the District Court of the United States for the Western District of Oklahoma

Mr. F. A. Rittenhouse and Mr. Hal C. Thurman (Mr. Frank E. Lee and Mr. John F. Webster were with them on the brief) for appellants.

Mr. Frank G. Anderson (Mr. Chester H. Lowry, Mr. R. M. Rainey, Mr. Streeter B. Flynn, and Messrs. Rainey, Flynn, Green & Anderson were with him on the brief) for appellee.

Before Lewis, Phillips and McDermott, Circuit Judges

LEWIS, Circuit Judge, delivered the opinion of the Court

OPINION—April 18, 1930

These appeals are from judgments on policies covering appellee's three-story brick school building, furniture and fixtures, and insuring the district against all loss or damage by fire. The policies were in the Oklahoma standard form. Comp. Okla. Stat. 1921, Sec. 6767. The issues presented here are raised by demurrers to the amended complaints: (1) Whether the actions were instituted within the time limited by the policies, and (2) whether the requirements of the policies that insured should furnish written sworn proofs of loss was waived and insurers by their acts and [fol. 403] conduct estopped to rely on that requirement. A third question, whether the court erred in allowing interest on the amounts recovered, is also presented.

Suits were brought in the State court within twelve months next after the fire, and then removed by appellants to the Federal court. After removal amended complaints were filed. It is contended by counsel for appellants that the amended complaints departed from the originals and stated new causes of action, and inasmuch as the amended complaints were not filed within the twelve months limited by the policies in which actions could be brought, the bar had fallen.

The only difference between the original and amended complaints is, the former alleged full compliance by appellee with all conditions and requirements of the policies to be kept and performed by it; whereas the latter alleged compliance by appellee with all conditions except the requirement it should furnish within sixty days after the fire sworn proof of loss; but as to that, it was alleged the insurers by their acts and conduct, specified in detail, had waived that requirement and estopped themselves. The acts and conduct on which the pleas of waiver and estoppel were based, had occurred prior to the time the actions were instituted in the State court; and of course appellants knew at all times that written and sworn proof of loss had not

been furnished to them. It may be conceded, as we do (American Mills Co. v. Hoffman, 275 Fed. 285), that, if the amendments had abandoned the original cause of action on the policies and had set up entirely different and new causes of action, the point would be well taken,—more than twelve months having expired after the fire before the amendments were filed. But how can that contention be maintained when it clearly appears that the same wrong is made the subject of litigation in both original and amended complaints? In both originals and amendments plaintiff alleged the property insured was wholly destroyed by fire on January 2, 1926, that the policies issued by defendants insuring against loss or damage by fire were then in force and effect, that defendants had failed and refused to pay to plaintiff the loss sustained, and judgments were asked for the amounts named in the policies. The same relief was asked for the same breaches of the same contracts. A cause of action is the subject matter of controversy, the wrong of which plaintiff complains and for which he asks relief. The Federal statute directing that amendments of pleadings be allowed (U. S. Code Tit. 28, Sec. 777) is remedial in character and has at all times been liberally construed. The extent to which the courts have gone in this respect is illustrated in McDonald v. State of Nebraska, [tol. 404] 101 Fed. 171, and Mims v. Reid, 275 Fed. 177. Moreover, it may be doubted whether good pleading requires a plaintiff to negative the performance of conditions subsequent to the loss to entitle him to recover. The supreme court of Oklahoma has held that it is necessary. Palatine Ins. Co. v. Lynn, 141 Pac. 1167; North British & Mercantile Ins. Co. v. Lucky Strike Oil & Gas Co., 173 Pac. 845; while the supreme court of New Mexico has held that such conditions go to defeat the liability of the insurer, are matters of defense and have no place in the declaration. Robinson v. Palatine Ins. Co., 66 Pac. 535. Again, appellants by their motions to make more definite and certain induced appellee to set up the pleas of waiver and estoppel. They moved that the plaintiff be required to state whether or not it furnished the defendants proofs of loss in the manner and form required by the policies. And then in their answers they plead those parts of the policies relating to furnishing the proofs of loss and alleged that those require-

ments had never been waived by appellants. Plaintiff's replies reiterated the waivers. The contention seems to be entirely without merit.

The next question goes to the sufficiency of appellee's pleas of waiver and estoppel. Those pleas are challenged as to both law and fact. As to the first it is said, oral waivers of proof of loss are conclusively precluded by the terms of the contracts; and as to the second, the pleas are bad in point of fact. As to the first, certain conditions of the policies are relied on. Those conditions and their requirements are these: If a fire occurred the insured was to give immediate notice of any loss thereby in writing to the company, and within sixty days after the fire renders a statement to the company signed and sworn to be the insured stating his knowledge and belief as to the time and origin of the fire, the interest of insured and all others in the property, the cash value of each item and the amount of loss thereon, all encumbrances thereon, all other insurance, a copy of all descriptions and schedules in all policies, any changes in the title, use, occupation, location, possession or exposure of the property since the issuing of the policy, and by whom and for what purpose the building and its several p rts were occupied at the time of the fire. That the company should not be held to have waived any provision or condition of the policy by any requirement, act or proceeding on its part relating to the appraisal or any examination provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by the company, including an award by appraisers when appraisal has been required. [fol. 405] No suit or action on the policy for the recovery of any claim shall be sustainable in any court until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire. In any matter relating to this insurance no person unless duly authorized in writing shall be deemed the agent of insurer. No officer, agent or other representative of the insurer shall have power to waive any provision or condition of the policy except such as by the terms of the policy may be the subject of agreement endorsed thereon or added thereto, and as to

such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached thereto, nor shall any privilege or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached.

The last noted provisions are aptly referable to certain contractual obligations assumed by the insurers in the policies. For instance, the policy granted permission to make certain alterations, improvements and repairs and prohibited the making of other and more substantial work upon the building unless permission to do so is specifically covered by endorsement attached to the policy; no gasoline in excess of a certain amount could be kept or used on the premises unless permitted by endorsement on the policy. The building could not be abandoned for school purposes for an indefinite period without written permission endorsed on the policy. Permission was granted to use artificial or natural gas for fuel or light only when supplied through Public Service gas pipes. These all appear to be conditions affecting the insurer's risk, contractual obligations, and could not be waived except in the manner required, that is, by endorsement in writing.

We pass now to a summary of the challenged pleas. The amended complaints alleged that on January 2, 1926, and within two or three hours after the fire had destroyed the building and furniture and fixtures therein, the plaintiff notified appellants' agents of the fire and the extent of the damage and destruction with the request that they notify their companies. That within two or three days thereafter the appellants selected named persons to represent them and authorized such persons to investigate the fire and make estimates as to the value of the property destroyed and settle for the loss; that these adjusters for the insurers visited the scene of the fire and made examinations as to the value of the property destroyed and the circumstances surrounding the fire, and had plaintiff furnish them with [fol. 406] the items of the property destroyed, the plans and specifications of the building, which plaintiff furnished, and requested plaintiff to furnish assistance to a building contractor selected and appointed by the insurers and their

adjusters, who was to make estimates of the value of the property destroyed and collect information as to its condition at the time of the loss; that thereafter on the 27th day of February, 1926, which was the 56th day after the fire, the said adjusters and the members of plaintiff's board of trustees held a meeting at the scene of the fire; that said building contractor was at said meeting; that said meeting was held for the purpose of discussing the settlement and adjustment of the loss sustained by plaintiff; that thereupon all of the insurers, acting through their said adjusters and agents, stated to plaintiff's board that they had made full and complete investigation as to the fire and the market value of the building and furniture and fixtures therein destroyed by said fire and had obtained all and the correct information thereon, that there was no question as to the loss upon the furniture and fixtures in the sum of $3,400.00 and that appellants were then and there ready to pay plaintiff that sum for its loss on the furniture and fixtures; that said insurers, through their adjusters and agents, at the same time stated that said building was overvalued and could not be replaced for the sum of approximately $53,000, and then offered the sum of approximately $56,000 as full payment for all of the loss of both said buildings and furniture and fixtures destroyed; that plaintiff declined to accept said amount and requested the insurance companies, through their adjusters, to replace said building, this however the insurers refused to do; that plaintiff's board at said meeting contended that the value of the building was $75,000; that the value of the building and its replacement cost were the only matters discussed as to which there was any disagreement; no objection was made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that the insurers at said meeting, by their conduct in offering to pay the full amount of insurance upon the furniture and fixtures and in offering to pay the sum of $53,000 for the loss of the building, led the plaintiff to believe that the only matter in dispute was the market and replacement value of the building, the appellants contending on the one hand that the market and replacement value was the sum of $53,000 and the plaintiff contending that the value was $75,000, and that by reason of the facts stated appellants waived the furnishing of

proofs of loss in strict accordance with the provisions of the policies and are estopped to set up and claim such failure to furnish proofs; that appellants, through the exam- [fol. 407] inations and efforts of their adjusters and the assistance of plaintiff's board rendered at the request of the adjusters obtained all the information which could have been obtained had proof of loss been furnished in strict conformity to the policies and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss.

After giving due consideration to all requirements of the policies to which we have made reference in above summary of their contents, we think the weight of authority is opposed to the contention that waivers of proof of loss in these cases could be made only in writing endorsed upon or attached to the policies. They could not be furnished until after the loss had occurred and liability of the insurers if any had accrued. The requirement was a condition subsequent and only provided means, if accepted as to verity, by which insurer's liability and its extent could be ascertained. But insurers were not bound to accept them, they could make their own investigation of the facts called for in the proof and stand on their conclusions so reached, in disregard of proof furnished. The policies provided that the loss should not become payable until sixty days after satisfactory proof of loss had been received by the insurer. Had the insurers stood by for the sixty days after the fire, during which time the insured might make proof of loss and no proof had been forthcoming, the insured would have been without right of recovery; or had proof been furnished within that time, the insurers, if not satisfied with the proof furnished, still had sixty days within which they could make their own investigation as to their liability and the extent thereof, before the loss became payable. That afforded them ample protection. They chose to ignore both alternatives. They sent their agents and adjusters to the scene of the fire within a few days after it occurred to make investigations and settlement with the insured. They called on the insured for assistance in making their investigations. That assistance was given. Its thoroughness cannot be doubted. All material fact must have been discovered. At least the pleas were broad enough to admit proof they were discovered; and they

were full enough to satisfy insurers in making a substantial offer of settlement on the 56th day after the fire—$8,400 less than the judgments recovered. Under a policy with like conditions, in substance, to those here relied on, the Circuit Court of Appeals for the Ninth Circuit said, in Twin City Fire Ins. Co. v. Stockmen's National Bank, 261 Fed. 470, 476:

"Clauses in insurance policies, prohibiting waiver unless the same is indorsed thereon, refer only to the provisions which enter into the contract of insurance, and they [fol. 408] do not affect conditions which are to be performed after loss, such as furnishing proof of loss and giving notice. These may be waived, either by expressed words or by conduct inconsistent with an intention to enforce a strict compliance with the conditions, and which conduct is calculated to lead the insured to believe that the insurers do not intend to require such compliance. Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689; Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Wheaton v. Insurance Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Rokes v. Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81; McCollough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862. And an adjuster sent to adjust a loss presumably has authority to waive proof of loss. Slater v. Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 181; Popa v. Northern Ins. Co., 192 Mich. 237, 158 N. W. 945; Milwaukee Mechanic's Institute v. Fuquay, 120 Ark. 330, 179 S. W. 497; Lusk v. American Cent. Ins. Co., 80 W. Va. 39, 91 S. E. 1078; Wholley v. Western Assurance Co., 174 Mass. 263, 54 N. E. 548, 75 Am. St. Rep. 314; Teasdale v. Insurance Co., 163 Iowa 596, 145 N. W. 284, Ann. Cas. 1916A, 591."

This ruling was adhered to by that court in Alliance Ins. Co. v. Enders, 293 Fed. 485. The Circuit Court of Appeals for the Sixth Circuit is in accord with the Ninth. In Continental Ins. Co. v. Fortner, 25 F. (2d) 398, 402, it said on the subject:

"It is the prevailing rule that a clause in a policy of insurance prohibiting any waiver unless indorsed thereon refers only to those provisions of the policy which enter

into and form part of the contract of insurance, and which may properly be designated as conditions; it has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proofs."

This was followed by that court in Firemen's Ins. Co. v. Brooks, 32 F. (2d) 451. The Fifth Circuit, in Home Ins. Co. v. Highower, 22 F. (2d) 882, cited with approval the opinion of the Ninth Circuit in 261 Fed. 470, supra. The Supreme Court, in Royal Ins. Co. v. Martin, 192 U. S. 149, 162, held that proofs of loss were waived where the insured denied its liability or refused to pay in any event. The great weight of authority in the State courts, including those in this circuit is against appellants. See 26 C. J., [fol. 409] pp. 405, 406. Appellants rely on Scottish Union & National Ins. Co. v. Encampment Smelting Co., 166 Fed. 231, in the Eighth Circuit. The opinion in that case fully supports their contention, but the case seems to stand alone, and its soundness has been seriously doubted in later decisions of that court, to-wit: New York Underwriters Fire Ins. Co. v. Malhan & Co., 25 F. (2d) 415, and Hartford Fire Ins. Co. v. Empire Coal Mining Co., 30 F. (2d) 794, 802.

Judgments were not rendered until January 18, 1929, three years after the fire, and they contain in addition to the sums fixed as damages, interest at the rate of six per cent per annum from May 2, 1926. The policies allowed sixty days after the fire for proofs of loss, and then sixty days more after receipt of the proofs before the loss became payable. By the contracts the latest due date would be May 2nd, 120 days after the fire. The Oklahoma statutes (Sec. 5977, Comp. Okla. Stat. 1921) provides:

"The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

In Morley v. Lake Shore Ry. Co., 146 U. S. 162, at 168, this is said:

"If the State declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest shall continue to run until payment,

or until the owner of the cause of action elects to merge it into judgment."

In Miller v. Robertson, 266 U. S. 243, 257, 258, we find this:

"Compensation is a fundamental principle of damages, whether the action is in contract or in tort. Wicker v. Hoppock, 6 Wall. 94, 99. One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. Curtis v. Innerarity, 6 How. 146, 154. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. Spaulding v. Mason, 161 U. S. 375, 396. Generally, interest is not allowed upon unliquidated damages. Mowry [fol. 410] v. Whitney, 14 Wall. 620, 653. But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages."

To the last proposition stated citation is made to Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 Atl. 134, and other cases. In the Connecticut case there was the same controversy over the question of waiver of proof of loss as here. There was also an unsuccessful effort to arbitrate and finally the insured sued. The court, in addition to damages found, allowed interest thereon from the preceding date of the defendant's repudiation of liability. This was affirmed as constituting an element of the recoverable damages. The parties having agreed on the date when the loss suffered was payable, we see no reason why the insured should not have interest from that date.

The judgments are affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

JUDGMENTS—April 18, 1930

(No. 162)

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court, in this cause, be and the same is hereby affirmed, and that School District No. 98 of Payne County, State of Oklahoma, appellee, have and recover against Concordia Insurance Company of Milwaukee, a corporation, appellant, its costs herein and have execution therefor.

(No. 197)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court, in this cause, be and the same is hereby af-
[fols. 411 & 412] firmed, and that School District No. 98 of Payne County, State of Oklahoma, appellee, have and recover against Royal Insurance Company, Ltd., a corporation, appellant, its costs herein and have execution therefor.

(No. 198)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court, in this cause, be and the same is hereby affirmed, and that School District No. 98, of Payne County, State of Oklahoma, appellee, have and recover against National Fire Insurance Company, a corporation, appellant, its costs herein and have execution therefor.

(No. 199)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and

adjudged by this court that the judgment of the said District Court, in this cause, be and the same is hereby affirmed, and that School District No. 98 of Payne County, State of Oklahoma, appellee, have and recover against Fire Association of Philadelphia, a corporation, appellant, its costs herein and have execution therefor.

[fols. 413 & 414] Index

Side page

Petition for Rehearing 415

Table of Cases

American Eagle Fire Insurance Co. v. Lively, Okla. Appellate Court Reporter, vol. 4, No. 4, page 150 418
City of Chickasha v. Hollingsworth, 56 Okla. 341 417
Great Northern Railway Co. v. Philadelphia & Reading Coal & Iron Co., 242 Fed. 799 417
Midland Valley Railway Co. v. Price, 127 Okla. 106 417
Speed v. McMurray et al., 73 Okla. 325 417
St. Paul Fire & Marine Insurance Co. v. Robinson, 72 Okla. 269 417

Statutes

Section 5972 Compiled Okla. Statutes 1921 416
Section 5977 Compiled Okla. Statutes 1921 416

[fol. 415] In United States Circuit Court of Appeals, Tenth Circuit

No. 162

Concordia Insurance Company of Milwaukee, a Corporation, Appellant,

vs.

School District No. 98 of Payne County, State of Oklahoma, Appellee

No. 197

ROYAL INSURANCE COMPANY, LTD., a Corporation, Appellant,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Appellee

No. 198

NATIONAL FIRE INSURANCE COMPANY, a Corporation, Appellant,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Appellee

No. 199

FIRE ASSOCIATION OF PHILADELPHIA, a Corporation, Appellant,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Appellee

PETITION OF APPELLANTS FOR REHEARING—Filed May 12, 1930

"Come now the appellants in the above styled and num-[fol. 416] bered causes, consolidated for hearing and decision in this Court, and respectfully show to the Court that a judgment and opinion was entered and filed in these causes on April 18, 1930, affirming the judgment in each of said cases and holdings, among other things, that the plaintiff below and appellee here was entitled to interest on the amount in each case for which the jury returned its verdict from May 2, 1926 (120 days after the fire). The appellants, as grounds for rehearing herein, respectfully show to the Court:

I

That the judgment and opinion of this Court is in conflict with an express statute of the State of Oklahoma, being Section 5972 Compiled Oklahoma Statutes, 1921, reading as follows:

"Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the

right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

said statute being quoted on page 44 of the brief of appellants and duly called to the attention of the Court.

II

That the Court, in its opinion, has completely overlooked the decisions of the Supreme Court of Oklahoma construing the above statutory provision and making application thereof to a state of facts identical with the facts in this case, and holding that said statute is applicable to such facts rather than Section 5977 Compiled Oklahoma Statutes, 1921, upon which this Court's conclusion was based, said Oklahoma decisions being:

[fol. 417] St. Paul Fire & Marine Insurance Co. v. Robinson, 72 Okla. 269, 180 Pac. 702;
City of Chickasha v. Hollingsworth, 56 Okla. 341, 155 Pac. 859;
Speed v. McMurray, et al., 73 Okla. 325, 176 Pac. 506;
Midland Valley Ry. Co. v. Price, 127 Okla. 106, 260 Pac. 26.

In all of said cases, it is expressly held that interest on the amount of plaintiff's recovery, where such amount must be determined by a verdict of a jury or a judgment of a court, cannot be allowed until after judgment.

III

The Court overlooked, and in its opinion made no reference to the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the case of Great Northern Railway Co. v. Philadelphia & Reading Coal & Iron Co., 242 Fed. 799, cited in the brief of appellants on page 48, in which, after stating the general rule that no interest can be recovered for the breach of a contract where the damages are in their nature unliquidated and there is no reasonable standard by which the amount can be determined until the amount has been ascertained, states:

"The general rule is not open to controversay, but there is an exception to it in cases where the unliquidated claim is

subject to an exact computation by reference to available data, or where the amount is subject to reasonably certain calculation by reference to existing market values."

The court, in its opinion, overlooked a question decisive of this case so far as interest on plaintiff's recovery is concerned, in this, to-wit: That it was shown to the Court by the brief and argument of appellants that the school building destroyed by fire January 2, 1926, was a character of [fol. 418] property not subject to sale or exchange and, therefore, had no fixed market value, and that there was, therefore, no reasonable standard for determining the value of said building or the loss sustained by the School District, and that, therefore, under the Oklahoma statute above quoted, the School District, where there was a bona fide dispute as to the amount of its loss, was not entitled to recover interest until the amount of the loss had been determined by the verdicts of the jury, and, in this connection, the attention of the Court is respectfully directed to the recent decision of the Supreme Court of the State of Oklahoma in the case of American Eagle Fire Insurance Company v Lively, No. 18929, decided April 8, 1930, after the oral argument in this case and which, therefore, has not heretofore been called to the Court's attention, said decision being reported in Oklahoma Appellate Court Reporter, Vol. 4, No. 4, page 150, issued April 11, 1930. In that case, on the question of interest on the amount of a loss under fire insurance policy the Court said:

"It is next contended that the trial court erred in allowing plaintiff interest prior to judgment—interest was allowed from date of filing suit. St. Paul Fire & Marine Ins. Co. v. Robinson, 72 Okla. 269, 180 Pac. 702, and Schaff v. Hudgins, 96 Okla. 173, 221 Pac. 80, are cited in support of this contention. In our opinion, these cases are controlling. Section 5972, C. O. S. 1921, provides:

"'Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a certain day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.'

"Considering the nature of the property destroyed and the difficulty in ascertaining the actual or fair value thereof,

[fol. 419] we think interest should not have been allowed until the claim was reduced to judgment.

"Judgment should be modified by computing interest only from date of judgment, and, as so modified, should be affirmed."

With reference to the character of property involved in the loss under consideration by the Supreme Court of Oklahoma, the Court says:

"It further appears that the property destroyed consisted of library books and household furniture, the major part being books. Immediately after the fire, plaintiff made a list of the number of books on hand at the time of the fire and their value. At the trial, he was permitted to refer to this list in testifying as to the value of the books destroyed, and, after testifying that the value as set forth in this list was obtained partly from memory and partly from catalogs, he was permitted to testify, over objection of defendant, that the value thereof at the time of the loss was $3,558."

It is insisted that if the library books and household furniture in that case is a character of property where it is difficult to ascertain the actual or fair value thereof, then there can be no question but that, in the cases before this Court, the school building which had been altered and added to from time to time, and which was not even a character of property which could be sold or exchanged, it was more difficult to ascertain its actual and fair value than in the case of personal property which was in fact articles being purchased and sold and whose prices were quoted in various catalogs used as a basis for determining value in that case.

It is further represented to the Court that said decision of April 8, 1930, citing and approving the decision of said [fol. 420] Court in St. Paul Fire & Marine Insurance Co. v. Robinson, cited in the brief of appellants and following the rule of law therein laid down, has become final, no petition for rehearing having been filed, and finally and definitely establishes the rule in the State of Oklahoma relative to the allowance of interest on the recovery under a fire insurance policy where, considering the nature of the property destroyed, it is difficult to ascertain the actual or fair value thereof, and a verdict of a jury or a judgment of a court is necessary to determine the loss or damage.

Wherefore, the premises considered, appellants respectfully petition the Court to enter an order staying the mandate herein and, upon consideration hereof, to grant to these appellants a rehearing in said causes, and to modify the judgments in these cases by reducing said judgments in the amount of the interest accruing between May 2, 1926, and the date said judgments were entered.

Respectfully submitted.

Hal C. Thurman, F. A. Rittenhouse, Frank E. Lee, John F. Webster, Oklahoma City, Oklahoma, Counsel and Attorneys for Appellants.

United States of America,
Western District of Oklahoma, ss:

We, the undersigned, are counsel and attorneys for the appellants in the above and foregoing petition for rehearing, and have prepared the same, and we hereby certify [fols. 421 & 422] that, in our opinion, the petition is well founded and it is not made for the purpose of delay.

Witness our hands at Oklahoma City in said District this 6th day of May, 1930.

Frank E. Lee, Hal C. Thurman.

Subscribed and acknowledge before me the day and date aforesaid. Cecil Bundy, Notary Public. My commission expires November 25, 1931.

[File endorsement omitted.]

[fol. 423] In United States Circuit Court of Appeals

Order Denying Rehearing—May 14, 1930

These causes came on to be heard on petitions for rehearing and motions for a stay of the mandates of this court, and were submitted to the court.

On consideration whereof, it is now here ordered by the court that said petitions and motions and each thereof be and the same are hereby denied.

In United States Circuit Court of Appeals

Application for Stay of Mandate—Filed May 26, 1930

Come now the appellants in the above entitled causes and show to the Court that appellants are aggrieved by the

judgment rendered in said causes on April 18, 1930, and the order of said Court overruling the petition of said appellants for rehearing in said causes entered May 14, 1930, and that it is the intention and purpose of appellants to apply to the Supreme Court of the United States for a writ of certiorari in said causes to review the said judgment and proceedings in this Court.

Appellants further show to the Court that good and sufficient supersedeas and appeal bonds have heretofore been executed by said appellants and their sureties properly and amply guaranteeing the payment of the judgments rendered in the District Court of the United States for the Western District of Oklahoma, against said appellants, and all costs in said causes.

Wherefore, appellants pray that an order be entered staying the mandate or mandates in said causes for a period of 60 days from this date and fixing the amount of security for costs, granting a supersedeas and stay of execution or other proceedings under said judgment or decree pending said proceedings upon certiorari in said causes.

Frank E. Lee, Hal Thurman, F. A. Rittenhouse, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 424] In United States Circuit Court of Appeals

Order Staying Mandates—May 26, 1930

Now on this 17th day of May, 1930, the above causes came on for hearing before the Honorable John H. Cotteral, Judge of the United States Circuit Court of Appeals for the Tenth Circuit, upon the application of appellants for a stay of the mandate or mandates in said causes, and for good cause shown.

It Is Ordered that the mandate or mandates in said causes be stayed for a period of 60 days from this date, and thereafter said mandate or mandates and execution or executions, or other proceedings under the judgment or decree rendered in said causes on the 18th day of April, 1930,

be stayed upon the execution by each of said appellants of a bond to secure all costs, damages and interest that may accrue in the prosecution of proceedings for writs of certiorari, or on account of the stay of said mandate, mandates, execution, executions, or other proceedings in said causes, each of said bonds to be in the sum of $5,000.00 and to be approved by the Clerk of said United States Circuit Court of Appeals for the Tenth Circuit.

(In compliance with the foregoing order the following supersedeas bonds, each in the sum of $5,000.00, executed on the 19th day of May, 1930, and approved on the 20th day of May, 1930, by John H. Cotteral, Circuit Judge, were filed on the 26th day of May, 1930, in the following numbered cases, respectively, to-wit:

(In No. 162 with The Concordia Fire Insurance Company of Milwaukee, a Corporation, as principal, and Fidelity and Deposit Company of Maryland, a Corporation, as surety.

(In No. 197 with Royal Insurance Company, Ltd., a Corporation, as principal, and Constitution Indemnity Company, a Corporation, as surety.

(In No. 198 with National Fire Insurance Company, a Corporation, as principal, and Constitution Indemnity Company, a Corporation, as surety.

(In No. 199 with Fire Association of Philadelphia, a Corporation, as principal, and Constitution Indemnity Company, a Corporation, as surety.)

[fol. 425] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 426] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 278

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is

granted, and the case is assigned for hearing on Monday, January 12 next, after the case heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 427] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 279

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The position herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for hearing on Monday, January 12 next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 428] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 280

ORDER ALLOWING CERTIORARI– Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for hearing on Monday, January 12 next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 429] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 281

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for hearing on Monday, January 12 next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 35,200, 35,201, 35,202, 35,203. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 278. Concordia Insurance Company of Milwaukee, petitioner, vs. School District No. 98 of Payne County, State of Oklahoma. Term No. 279. Royal Insurance Company, Ltd., petitioner, vs. School District No. 98 of Payne County, State of Oklahoma. Term No. 280. National Fire Insurance Company, petitioner, vs. School District No. 98 of Payne County, State of Oklahoma. Term No. 281. Fire Association of Philadelphia, petitioner, vs. School District No. 98 of Payne County, State of Oklahoma. Petition for writs of certiorari and exhibit thereto. Filed July 9, 1930. File Nos. 35,200, 35,201, 35,202, 35,203.

FILE COPY

JUL 9 1930
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 278

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 279

ROYAL INSURANCE COMPANY, LTD., PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 280

NATIONAL FIRE INSURANCE COMPANY, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 281

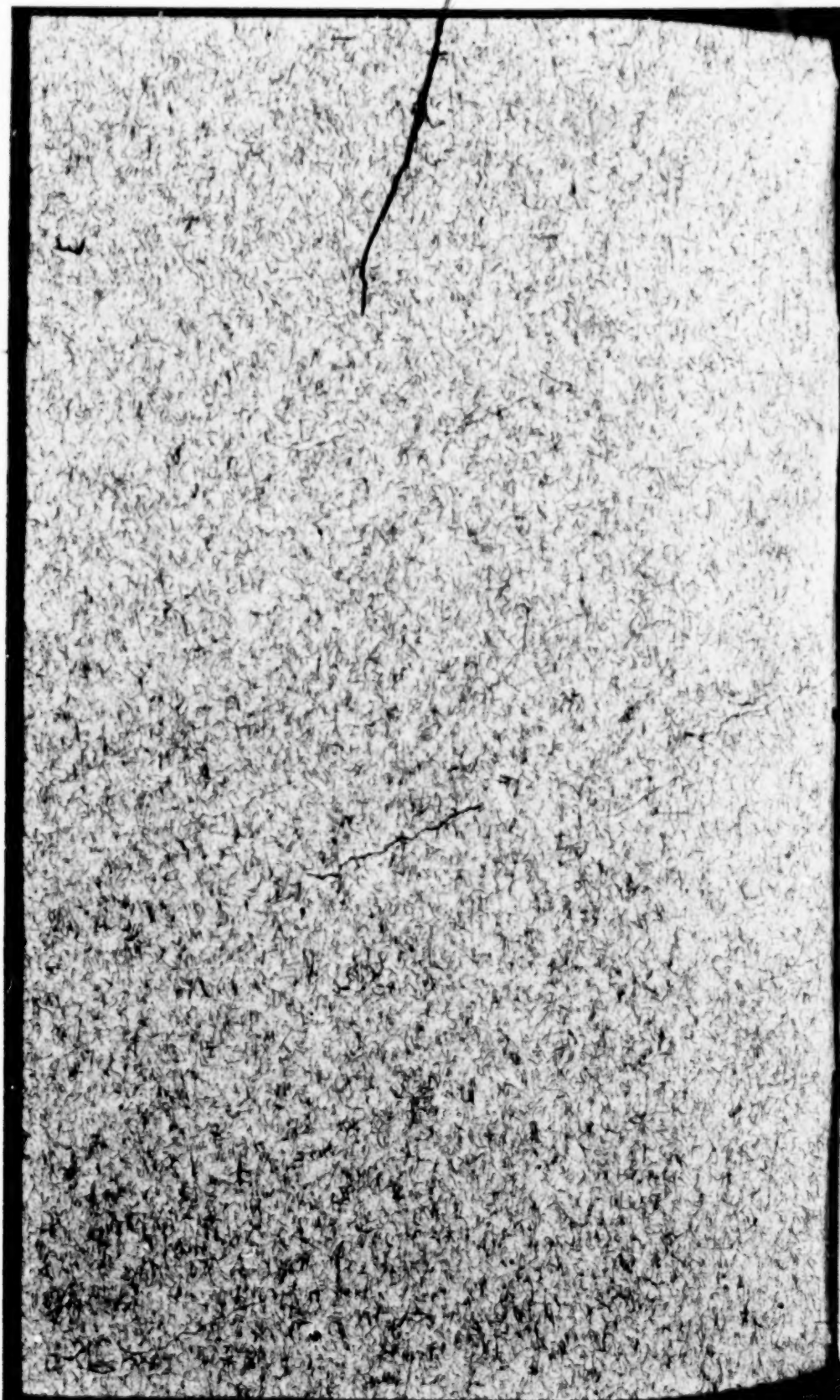
FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

F. A. RITTENHOUSE,
H. C. THURMAN,
Counsel for Petitioners.



INDEX.

Subject Index.

	Page
Petition for writs of certiorari	1
Summary statement of the matter involved	1
Reasons relied on for the allowance of the writs	2
Prayer for writs	6
Brief in support of petition for writs of certiorari	9
Argument	9
Conclusion	20

Table of Cases Cited.

Ætna Life Insurance Co. v. Moore, 231 U. S., 543; 58 L. Ed., 356; 34 Sup. Ct., 186	19
American Eagle Fire Insurance Co. v. Lively, 286 Pac., 797	2, 10, 11, 13, 15
Atlas Reduction Co. v. New Zealand Ins. Co., 138 F., 497	19
Bank of South Jacksonville v. Hartford Fire Ins. Co., 1 F. (2d), 43	5
Bunch v. Cole, 263 U. S., 250; 44 Sup. Ct., 101; 68 L. Ed., 280	12
Central Union Telephone Co. v. City of Edwardsville, 46 Sup. Ct., 90; 269 U. S., 190; 70 L. Ed., 229	11
City of Chickasha v. Hollingsworth, 56 Okla., 341; 155 Pac., 859	3, 10
Chicago, M., St. P. & P. R. Co. v. Risty, 48 Sup. Ct., 396; 276 U. S., 567; 72 L. Ed., 703	11
Curtis-Gartside Co. v. Ætna Life Ins. Co., 100 Pac., 465	3
Fidelity-Phenix Fire Ins. Co. v. Queen City Bus & Transfer Co., 3 F. (2d), 784	19
Fidelity-Union Fire Ins. Co. v. Kelleher, 13 F., 745	19
Fire Ass'n of Philadelphia v. Nime, 9 Fed. (2d), 28	19
Hartford Fire Ins. Co. v. Nance, 12 F. (2d), 575	19
Hunter v. City of Pittsburgh, 28 Sup. Ct., 40; 207 U. S., 161; 52 L. Ed., 151	12
Imperial Fire Ins. Co. v. County of Coos, 151 U. S., 452; 38 L. Ed., 231	6
Louisville Gas & Electric Co. v. Coleman, 48 Sup. Ct., 423; 277 U. S., 32; 72 L. Ed., 770	11

Page

Lumber Underwriters of New York v. Rife, 207 U. S., 605; 59 L. Ed., 1140..... 5, 18
Midland Valley R. R. Co. v. Price, 127 Okla., 106; 260 Pac., 26. 3, 10
Missouri Pacific Ry. Co. v. Western Assurance Co., 129 F., 610. 5
New York Life Insurance Co. v. Dunlevy, 214 F., 1; 130 C. C. A., —; affirmed 36 Sup. Ct., 613; 241 U. S., 518; 60 L. Ed., 1140..... 12
Northern Assurance Co. v. Grandview Bldg. Ass'n, 183 U. S., 308; 46 L. Ed., 212..... 5, 6, 18
North British & Mercantile Ins. Co. v. Lamar Harris, 34 F. (2d), 94..... 5
Penman v. St. Paul Fire & Marine Ins. Co., 246 U. S., 311; 54 L. Ed., 492; 30 Sup. Ct., 312..... 19
Peoples National Bank of Lynchburg v. Marye, 107 F., 570; 24 Sup. Ct., 68; 191 U. S., 272; 48 L. Ed., 180..... 12
Riddlebarger v. Hartford Fire Ins. Co., 74 U. S., 386; 19 L. Ed., 257 5
San Francisco Savings Union v. Western Assurance Co., 157 F., 695..... 5
Scottish Union & National Ins. Co. v. Encampment Smelting Co., 166 F., 231..... 4, 5, 16, 19
St. Paul Fire & Marine Ins. Co. v. Robinson, 72 Okla., 269; 180 Pac., 702..... 3, 10, 11, 15
Speed v. McMurray et al., 73 Okla., 325; 176 Pac., 506..... 3, 10
Stebbins v. Riley, 45 Sup. Ct., 424; 268 U. S., 137; 69 L. Ed., 884 11

STATUTES CITED.

Compiled Oklahoma Statutes, 1921, Section 5972..... 9, 11, 13, 15
5977..... 3

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 278

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 279

ROYAL INSURANCE COMPANY, LTD., PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 280

NATIONAL FIRE INSURANCE COMPANY, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 281

FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

PETITION FOR WRITS OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Concordia Insurance Company of Milwaukee, Wisconsin, Royal Insurance Company,

Ltd., National Fire Insurance Company and Fire Association of Philadelphia, respectfully present to this Court this their petition for writs of certiorari, to be directed to the Circuit Court of Appeals for the Tenth Circuit and the clerk thereof, to certify to this Court the record and proceedings in the above consolidated case in said Court, wherein your petitioners were appellants and the respondent was appellee, together with the opinion of said Court therein, for review and determination of said cause by this Court.

Your petitioners further show that judgments were rendered against your petitioners respectively (Tr. 103-111) in the District Court of the United States for the Western District of Oklahoma, upon policies of fire insurance issued by petitioners to respondent, from which judgments an appeal was duly perfected to the Circuit Court of Appeals of the United States for the Tenth Circuit, and which Court affirmed such judgments (Opinion, Tr. 402-410).

Your petitioners further respectfully show that the said judgments of the trial court, affirmed as aforesaid by the Circuit Court of Appeals for the Tenth Circuit, are erroneous for the following reasons:

I.

That said judgments purport to and do decide an important question of local law, to wit, the construction of a State statute on the question of interest, diametrically opposed to the construction placed on said statute by the Supreme Court of the State of Oklahoma in the case of American Eagle Fire Insur-

ance Company *v.* Lively, — Okla. —, 286 Pac. 797, decided on April 8, 1930, and not yet reported in the Oklahoma Report, and in opposition to the decisions of the Supreme Court of the State of Oklahoma, in the following cases:

St. Paul Fire & Marine Insurance Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702;

City of Chickasha *v.* Hollingsworth, 56 Okla. 341, 155 Pac. 859;

Speed *v.* McMurray *et al*, 73 Okla. 325, 176 Pac. 506;

Midland Valley Railroad Co. *v.* Price, 127 Okla. 106, 260 Pac. 26;

Curtis-Gartside Company *v.* Aetna Life Insurance Co. (Okla.), 169 Pac. 465.

That said Circuit Court of Appeals refused to follow the statute of Oklahoma as construed in the above cases and based its decision upon another statute of the State of Oklahoma, to wit, Section 5977, Compiled Oklahoma Statutes, 1921, which was inapplicable to this case. That the Supreme Court of Oklahoma has consistently held that interest runs from the date of judgment, which the Circuit Court of Appeals refused to follow, and decided otherwise.

II.

That said judgments are in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, out of which the Circuit Court of Appeals for

the Tenth Circuit was formed, namely, the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case of Scottish Union & National Insurance Company *v.* Encampment Smelting Company, 166 Fed. 231, said case laying down the rule that the provision of the fire-insurance policy requiring proof loss to be filed within sixty days is a condition precedent to the right of action and can only be waived in writing, and in the instant case, no written waiver of this provision was relied upon, and the Circuit Court of Appeals for the Tenth Circuit refused to follow the decision in Scottish Union & National Insurance Company *v.* Encampment Smelting Company, *supra*, and held that the provision of the policy requiring proof of loss to be filed within sixty days could be orally waived, which is diametrically opposed to the decisions heretofore in force in this jurisdiction.

III.

That said judgments purport to decide an important question of general law in a way which is untenable and in conflict with the great weight of authority in that the Circuit Court of Appeals in the instant case holds that there can be an oral waiver of a proof of loss under the terms and provisions of the fire-insurance policies sued on in this case, when, as a matter of fact, it is a well-settled principle of law in the Federal Court that where a policy or contract of insurance contains a standard provision with reference to waiver, as do the policies in the case at bar, parol evidence cannot be introduced to establish a

waiver, and that there can be no waiver of any of its conditions or provisions except such waiver be in writing, signed by the insurer or its duly authorized agent.

In support of this, we call the Court's attention to the following cases:

Northern Assurance Company *v.* Grandview Building Ass'n, 183 U. S. 308, 46 L. Ed. 212;

Lumber Underwriters of New York *v.* Rife, 207 U. S. 605, 69 L. Ed. 1140;

Scottish Union & National Insurance Co. *v.* Encampment Smelting Co., 166 Fed. 231;

Missouri, Pacific Ry. Co. *v.* Western Assurance Co., 129 Fed. 610;

San Francisco Savings Union *v.* Western Assurance Co., 157 Fed. 695;

Bank of South Jacksonville *v.* Hartford Fire Insurance Co., 1 Fed. (2d) 43;

Riddlebarger *v.* Hartford Fire Ins. Co., 74 U. S. 386, 19 L. Ed. 257;

North British & Mercantile Ins. Co. *v.* Lamar Harris, 34 Fed. (2d) 94.

That the great weight of Federal authority is to the effect that the standard provision of a fire-insurance policy requiring proof of loss within sixty days, unless the time thereof be extended in writing by the company, is a condition precedent to the right of action, and that such proof of loss must be filed within said period of time unless the filing thereof is extended or waived in writing, and that the decision in the instant

case is, therefore, contrary to the great weight of authority.

IV.

That the said judgments purport to decide an important question of Federal law, to wit, whether or not there can be an oral waiver of the provision of a standard fire-insurance policy requiring such proof of loss to be filed within sixty days unless the time thereof be extended in writing by the Company, which question has not been, but should be, settled by this Court. The nearest case on this subject by this Court is the leading case of Northern Assurance Company *v.* Grandview Building Ass'n. 183 U. S. 308, 46 L. Ed. 212, which case holds that the terms, provisions and conditions of a fire-insurance policy can be waived only in writing, and that a fire-insurance policy is a contract binding upon the assured when accepted, and also the case of Imperial Fire Insurance Company *v.* County of Coos, 151 U. S. 452, 38 L. Ed. 231, which deals with the question of oral waivers. Inasmuch as there are decisions of Circuit Courts diametrically opposed to one another on the subject of the oral waiver of proof of loss, it is important and essential that this Court pass upon and settle the law pertaining thereto.

WHEREFORE your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals of the United States for the Tenth Circuit, commanding that Court to certify and send to this

Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the cases of Concordia Insurance Company of Milwaukee *v.* School District No. 98 of Payne County, State of Oklahoma, No. 162; Royal Insurance Company, Ltd., *v.* School District No. 98 of Payne County, State of Oklahoma, No. 197; National Fire Insurance Company *v.* School District No. 98 of Payne County, State of Oklahoma, No. 198, and Fire Association of Philadelphia *v.* School District No. 98 of Payne County, State of Oklahoma, No. 199, and that the judgments rendered therein, as aforesaid, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just; and your petitioners will ever pray.

CONCORDIA INSURANCE COMPANY
OF MILWAUKEE, WISCONSIN,
ROYAL INSURANCE COMPANY, LTD.,
NATIONAL FIRE INSURANCE COMPANY,
FIRE ASSOCIATION OF PHILADELPHIA,
By F. A. RITTENHOUSE, AND H. C. THURMAN,
Oklahoma City, Oklahoma,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 278

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 279

ROYAL INSURANCE COMPANY, LTD., PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 280

NATIONAL FIRE INSURANCE COMPANY, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

No. 281

FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

That the judgments and opinion of the United States Circuit Court of Appeals for the Tenth Circuit purport to construe a State Statute of the State of Oklahoma different from and opposed to the construction given it by the Supreme Court of Oklahoma.

The statute in question is Section 5972, Compiled Oklahoma Statutes, 1921, reading as follows:

> "Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

Under the judgments as rendered, interest was rendered, interest was awarded by the trial court from May 2, 1926, said date being sixty days from the date on which proof of loss should have been furnished the insuring companies. Under the provisions of Section 5972, Compiled Oklahoma Statutes, 1921, *supra*, as construed by the decisions of the Supreme Court of the State of Oklahoma, interest should have been allowed only from the date of judgment, to wit, January 18, 1929.

The statute above referred to is construed in the following decisions by the Supreme Court of Oklahoma, to wit:

> St. Paul Fire & Marine Ins. Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702;
>
> City of Chickasha *v.* Hollingsworth, 56 Okla. 341, 155 Pac. 859;
>
> Speed *v.* McMurray *et al.*, 73 Okla. 325, 176 Pac. 506;
>
> Midland Valley Ry. Co. *v.* Price, 127 Okla. 106, 260 Pac. 26;
>
> American Eagle Fire Ins. Co. *v.* Lively, 286 Pac. 797 (not yet reported in Oklahoma Reports).

In those cases, it is held that under said statute interest is not recoverable on an unliquidated claim except from date of judgment, pursuant to the language of the above statute; that the amount of the claim must be determined by a verdict of a jury or a judgment of a court, and that the claim is unliquidated, the laws of Oklahoma not authorizing the assessment of interest under such circumstances except from date of verdict or judgment.

Attention of the Court is called to the fact that the cases of St. Paul Fire & Marine Ins. Co. *v.* Robinson, *supra*, and American Eagle Fire Ins. Co. *v.* Lively, *supra*, are both actions upon policies of insurance, the former upon a policy of insurance covering against loss by hail and the latter an action upon a policy covering against loss by fire to contents of a dwelling house.

It is the contention of the petitioners that the trial court and the United States Circuit Court of Appeals for the Tenth Circuit are bound by the decisions of the Supreme Court of the State of Oklahoma in the construction to be given Section 5972, Compiled Oklahoma Statutes, 1921, *supra*.

Louisville Gas & Electric Co. *v.* Coleman, 48 Sup. Ct. 423, 277 U. S. 32, 72 L. Ed. 770;

Chicago, M., St. P. & P. R. Co. *v.* Risty, 48 Sup. Ct. 336, 276 U. S. 567, 72 L. Ed. 703;

Stebbins *v.* Riley, 45 Sup. Ct. 424, 268 U. S. 137, 69 L. Ed. 884;

Central Union Telephone Co. *v.* City of Edwardsville, 46 Sup. Ct. 90, 269 U. S. 190, 70 L. Ed. 229;

New York Life Insurance Co. *v.* Dunlevy, 214 Fed. 1, 130 C. C. A. 437, affirmed 36 Sup. Ct. 613, 241 U. S. 518, 60 L. Ed. 1140.

That decisions of a State Court of last resort construing a State statute will be followed by United States Courts, see

People's National Bank of Lynchburg *v.* Marye, 107 Fed. 570; decree modified and affirmed 24 Sup. Ct. 68, 191 U. S. 272, 48 L. Ed. 180,

and that the construction placed on a State statute by the State Court of last resort is binding on the Federal Courts, see further

Hunter *v.* City of Pittsburgh, 28 Sup. Ct. 40, 207 U. S. 161, 52 L. Ed. 151;

Bunch *v.* Cole, 44 Sup. Ct. 101, 263 U. S. 250, 68 L. Ed. 290.

It is respectfully submitted by the petitioners that the judgments of the trial court, affirmed by the United States Circuit Court of Appeals for the Tenth Circuit, are erroneous on this question of the allowance of interest for the reason that the damages sought in such actions were unliquidated up to the time of the determination of the amount thereof by the judgments of the trial court; that the opinion rendered by the United States Circuit Court of Appeals for the Tenth Circuit sustaining said judgments failed to take into consideration the character of the building destroyed by fire January 2, 1926, namely, a school building; that it was a character of property not subject to sale or

exchange, and, therefore, had no fixed market value, and that there was no reasonable standard for determining the value of said building or the loss sustained by the School District, and that therefore, under the Oklahoma statute above quoted, the School District, where there was a *bona fide* dispute as to the amount of its loss, was not entitled to recover interest until the amount of the loss had been determined by the verdicts of the jury and the judgment of the trial court thereon.

In this connection, the attention of the Court is respectfully directed to the recent decision of the Supreme Court of the State of Oklahoma in the case of American Eagle Fire Insurance Company *v.* Lively, 286 Pac. 797 (not yet reported in the Oklahoma Reports). In that case, on the question of interest on the amount of the loss under fire insurance policy, the Court said:

> "It is next contended that the trial court erred in allowing plaintiff interest prior to judgment—interest was allowed from date of filing suit. St. Paul Fire & Marine Ins. Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702, and Schaff *v.* Hudgins, 96 Okla. 173, 221 Pac. 80, are cited in support of this contention. In our opinion, these cases are controlling. Section 5972, C. O. S. 1921, provides:
>
> "'Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a day certain, is entitled also to recover interest thereon from that day, except during such time as the debtor

is prevented by law, or by the act of the creditor from paying the debt.'

"Considering the nature of the property destroyed and the difficulty in ascertaining the actual or fair value thereof, we think interest should not have been allowed until the claim was reduced to judgment.

"Judgment should be modified by computing interest only from date of judgment, and, as so modified, should be affirmed."

With reference to the character of property involved in the loss under consideration by the Supreme Court of Oklahoma, the Court says:

"It further appears that the property destroyed consisted of library books and household furniture, the major part being books. Immediately after the fire, plaintiff made a list of the number of books on hand at the time of the fire and their value. At the trial, he was permitted to refer to this list in testifying as to the value of the books destroyed, and, after testifying that the value as set forth in this list was obtained partly from memory and partly from catalogs, he was permitted to testify, over objection of defendant, that the value thereof at the time of the loss was $3,558."

It is respectfully submitted that if the library books and household furniture in that case is a character of property the value of which is difficult of ascertainment, then there can be no question but that in the cases involved herein the school building, which had been altered and added to from time to time and which

was not even a character of property which could be sold or exchanged, it was more difficult to ascertain its actual and fair value than in the case of personal property, which was in fact articles being purchased and sold and whose prices were quoted in various catalogs used as a basis for determining value in that case.

It is further represented to this Honorable Court that said decision rendered as aforesaid by the Supreme Court of the State of Oklahoma in the case of American Eagle Fire Insurance Company *v.* Lively, *supra*, citing and approving the decision of said Court in St. Paul Fire & Marine Ins. Co. *v.* Robinson, *supra*, and following the rule of law therein laid down, has become final and has definitely established the rule in the State of Oklahoma relative to the allowance of interest on a claim under a fire insurance policy where, considering the nature of the property destroyed, it is difficult to ascertain the actual or fair value thereof, and a verdict of a jury or a judgment of a court is necessary to determine the loss or damage.

And it is respectfully submitted that the judgments of the trial court herein, and affirmed as aforesaid by the United States Circuit Court of Appeals for the Tenth Circuit, should be reversed for the reason that they are opposed to the construction given Section 5972, Compiled Oklahoma Statutes, 1921, *supra*, by the aforementioned decisions of the Supreme Court of the State of Oklahoma.

II.

The judgments in question are in conflict with the rule laid down in Scottish Union & National Ins. Co. v. Encampment Smelting Co., 166 Fed. 231 (8th Cir.), and other Federal decisions holding that the provision of a fire insurance policy requiring furnishing of proof of loss within sixty days after the date of loss is a condition precedent to the right to maintain action on the policy, and can be waived only in writing as provided by the policy sued on.

We quote here, for the convenience of the Court, again the proof of loss provisions of the policy sued on, and also the provisions thereof prescribing the manner in which any provision or condition of such policies may be waived:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege, or permission affecting the insurance under this policy exist

or be claimed by the insured unless so written or attached (Tr. 29-30).

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has

examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify (Tr. 35-36).

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required" (Tr. 36).

It is true that there are Federal decisions prior to the time of the insertion of these standard provisions which hold that waiver could be predicated upon oral or parol testimony, but these decisions were all prior to the insertion of these provisions in the policy with reference to waiver. The first time that this provision came before this Court for construction was in the case of the Northern Assurance Co. *v.* Grandview Building Ass'n, 183 U. S. 308, 46 L. Ed. 212, wherein this Court held that the language of the policy prescribing a limitation upon the authority of an agent of the insuring company to waive the violation of provisions of the policy is limited and restricted; that such waiver can be made only in writing indorsed upon the policy. This rule has been followed in numerous Federal decisions since the decisions in the case of Northern Assurance Co. *v.* Grandview Building Association, *supra*.

Lumber Underwriters of N. Y. *v.* Rife, 207 U. S. 605, 59 L. Ed. 1140;

Penman *v.* St. Paul Fire & Marine Ins. Co., 216 U. S. 311, 54 L. Ed. 492, 30 Sup. Ct. 312;

Aetna Life Insurance Co. *v.* Moore, 231 U. S. 543, 559, 58 L. Ed. 356, 366, 34 Sup. Ct. 186;

Atlas Reduction Co. *v.* New Zealand Ins. Co. (8th Cir.), 138 Fed. 497;

Fidelity-Phenix Fire Ins. Co. *v.* Queen City Bus & Transfer Co., 3 Fed. (2d) 784, (4th Cir.);

Fidelity-Union Fire Ins. Co. *v.* Kelleher (9th Cir.), 13 Fed. (2d) 745;

Fire Ass'n of Philadelphia *v.* Nime, 9 Fed. (2d) 28;

Hartford Fire Ins. Co. *v.* Nance *et al.*, 12 Fed. (2d) 575 (6th Cir.).

In the case of Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., 166 Fed. 231, it was held by the Eighth Circuit Court of Appeals that where the policy contains the standard provision prescribing the manner in which conditions contained in the policy may be waived, that the same constitutes a limitation upon the agent's power and authority to bind the insuring company by oral negotiations, and that the failure to furnish a proof of loss in the form and manner prescribed by the policy cannot be excused by a claimed waiver not in writing by an agent of the company, whose action was not ratified by the company.

It is, therefore, respectfully submitted that the judgments of the trial court herein, and affirmed by the United States Circuit Court of Appeals for the Tenth Circuit, as aforesaid, are directly in conflict with

the decision of the Circuit Court of Appeals for the Eighth Circuit, out of which the Circuit Court of Appeals for the Tenth Circuit was formed, and directly in conflict with the decisions of this Court and the great weight of authority from the Federal Courts of the various Circuits of the United States, and that said judgments purport to decide an important question of general law in regard to the waiver of terms and provisions of a policy of insurance in a way which is untenable and in conflict with the great weight of authority in the Federal Courts.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and jurisdiction in order that your petitioners may be protected in their legal rights, and that they be not deprived thereof unjustly, and that to that end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit and finally reverse it.

Respectfully submitted,

CONCORDIA INSURANCE COMPANY
OF MILWAUKEE, WISCONSIN,
ROYAL INSURANCE COMPANY, LTD.,
NATIONAL FIRE INSURANCE COMPANY,
FIRE ASSOCIATION OF PHILADELPHIA,

By F. A. RITTENHOUSE AND H. C. THURMAN,

Oklahoma City, Oklahoma,

Counsel for Petitioners.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 278

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

No. 279

ROYAL INSURANCE COMPANY, LTD., PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

No. 280

NATIONAL FIRE INSURANCE COMPANY, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

No. 281

FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

BRIEF OF PETITIONERS.

F. A. RITTENHOUSE,
H. C. THURCAN,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Brief of petitioners:	
Statement of facts	2
Propositions	21
I. That the judgments and opinion of the United States Circuit Court of Appeals for the Tenth Circuit purport to construe a State statute of the State of Oklahoma different from and opposed to the construction given it by the Supreme Court of Oklahoma	21
II. The judgments in question are in conflict with the rule laid down in Scottish Union & National Ins. Co. v. Encampment Smelting Co., 196 Fed., 231 (8th Cir.), and other Federal decisions holding that the provision of a fire insurance policy requiring furnishing of proof of loss within sixty days after the date of loss is a condition precedent to the right to maintain action on the policy, and can be waived only in writing as provided by the policy sued on	21
First Proposition	21
Oklahoma statutes on the question of interest	21
Oklahoma decisions on the question of interest	22
Second Proposition	27
Waivers of proof of loss must be in writing	27
Waiver	60

Table of Cases Cited.

Alliance Ins. Co. v. Enders, 230 Fed., 485	18, 55
American Eagle Fire Ins. Co. v. Lively, 142 Okla., 246; 286 Pac., 797	19, 25
Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed., 497	36, 50, 61
Bank of Jacksonville v. Hartford Fire Ins. Co., 1 Fed. (2d), 43	50
Boston Ins. Co. v. Hudson, 11 Fed. (2d), 961	61
Bunch v. Cole, 44 Sup. Ct., 101; 263 U. S., 250; 68 L. Ed., 290	27

Page

Central Union Telephone Co. v. City of Edwardsville, 46 Sup. Ct., 90; 269 U. S., 190; 70 L. Ed., 229 26
Christian & Brough Co. v. St. Paul Fire & Marine Ins. Co., 5 Fed. (2d), 489 61
City of Chickasha v. Hollingsworth, 56 Okla., 341; 155 Pac., 859 ..... 19, 23, 24
Chicago, M., St. P. & P. R. Co. v. Risty, 48 Sup. Ct., 396; 276 U. S., 567; 72 L. Ed., 703 26
Connecticut Fire Ins. Co. v. Buchanan, 141 Fed., 877 ..... 36, 44, 61
Continental Ins. Co. v. Fortner, 25 Fed. (2d), 398 ..... 18, 53
Curtis-Gartside Co. v. Ætna Life Insurance Co., 160 Pac., 465; 58 Okla., 470 ..... 19, 23
Fellman v. Royal Ins. Co., 184 Fed., 577 55
Fidelity Union Fire v. Kelleher, 13 Fed. (2d), 745 61
Fire Ass'n of Philadelphia v. Nime, 9 Fed. (2d), 28 ..... 55, 61
Firemens Ins. Co. v. Brooks, 32 Fed. (2d), 451 54
Forkner v. Twin City Fire Ins. Co., 19 Fed. (2d), 419 61
Globe & Rutgers Ins. Co. v. Prairie Oil & Gas Co., 248 Fed., 452 55
Harris v. North British & Mercantile Ins. Co., 30 Fed. (2d), 94 ..... 50, 51
Harris v. North British & Mercantile Ins. Co., 73 L. Ed., 401 .. 51
Hartford Fire Ins. Co. v. Barnard, 99 Okla., 24; 221 Pac., 1011 24
Hartford Fire Ins. Co. v. *Empire* Coal Mining Co., 30 Fed. (2d), 794 51
Hartford Fire Ins. Co. v. Jones, 15 Fed. (2d), 1 61
Hartford Fire Ins. Co. v. Nance, 12 Fed. (2d), 575 61
Hunter v. City of Pittsburgh, 28 Sup. Ct., 40; 207 U. S., 161; 52 L. Ed., 151 27
Imperial Fire Ins. Co. v. County of Coos, 151 U. S., 452; 38 L. Ed., 231 ..... 40, 49, 51, 61
Louisville Gas & Electric Co. v. Coleman, 48 Sup. Ct., 423; 227 U. S., 32; 72 L. Ed., 770 26
Lumber Underwriters of New York v. Rife, 237 U. S., 605; 59 L. Ed., 1141 ..... 43, 61
Lynchburg Cotton Mill Co. v. Travelers Ins. Co., 149 Fed., 954. 55
Midland Valley Railroad Co. v. Price, 127 Okla., 106; 260 Pac., 26 ..... 19, 23
Missouri-Pacific Ry. Co. v. Western Assurance Co., 129 Fed., 610 ..... 48, 51, 61
New York Life Insurance Co. v. Dunlevy, 214 Fed., 1; 130 C. C. A., 437; affirmed 36 Sup. Ct., 613; 241 U. S., 518; 60 L. Ed., 1140 26

Page

New York Life Ins. Co. v. Fletcher, 117 U. S., 519; 29 L. Ed., 934 61

New York Underwriters Fire Insurance Co. v. Malham & Co., 25 Fed. (2d), 415 53

Northern Assurance Co. v. Grand View Building Ass'n, 46 L. Ed., 212; 183 N. S., 308 ..... 34, 37, 44, 46, 49, 53

People's Bank of Greenville v. Ætna Ins. Co., 74 Fed., 507 52

Penman v. St. Paul Fire & Marine Ins. Co., 216 U. S., 311; 54 L. Ed., 493 ..... 44, 46

People's National Bank of Lynchburg v. Marye, 107 Fed., 570; modified and affirmed, 24 Sup. Ct., 68; 191 U. S., 272; 48 L. Ed., 180 26

Riddlesbarger v. Hartford Fire Ins. Co., 19 L. Ed., 257 43

Rife v. Lumber Underwriters, 234 Fed., 32 61

Royal Insurance Co. v. Ruperto Martin, Executor, 192 U. S., 149; 48 L. Ed., 385 47

San Francisco Savings Union v. Western Assurance Co., 157 Fed., 695 ..... 49, 51

Scottish Union & National Insurance Co. v. Encampment Smelting Co., 166 Fed., 231 ..... 20, 21, 28, 48, 52, 61

St. Paul Fire & Marine Ins. Co. v. Penman, 151 Fed., 961 61

St. Paul Fire & Marine Ins. Co. v. Robinson, 72 Okla., 269; 180 Pac., 702 ..... 19, 22, 25

Speed v. McMurray, 73 Okla., 325; 176 Pac., 506 ..... 19, 24

Stebbins v. Riley, 45 Sup. Ct., 424; 268 U. S., 137; 69 L. Ed., 884 26

Thompson v. Phœnix Ins. Co., 136 U. S., 287; 34 L. Ed., 408. 42, 47, 49

STATUTES CITED.

Compiled Oklahoma Statutes, 1921, Section 5972 ..... 21, 24, 25, 62

5977 ..... 19, 22

6148 54

6767 ..... 8, 27

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 278

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

No. 279

ROYAL INSURANCE COMPANY, LTD., PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

No. 280

NATIONAL FIRE INSURANCE COMPANY, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

No. 281

FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

BRIEF OF PETITIONERS.

In this case, writ of certiorari was allowed from the Circuit Court of Appeals for the Tenth Circuit. The

1*c*

issues are confined to the transcript, as the Circuit Court of Appeals for the Tenth Circuit sustained a motion to strike the record of the testimony and proceedings at the trial under the rules of court requiring the testimony to be set out in narrative form and not by questions and answers. The principal issues in the case, therefore, are two:

First, the trial court allowed interest from May 2, 1926, that being 60 days from the time proofs of loss should have been filed, though not filed, and the Circuit Court of Appeals for the Tenth Circuit affirmed the holding of the trial court on the question of interest.

Second, the trial court held that the oral waiver pleaded in the petitions in these cases was sufficient and that there could be an oral waiver of the terms and conditions of the insurance policy requiring proof of loss within sixty days from the date of the fire, unless the time is extended in writing by the company. The Circuit Court of Appeals for the Tenth Circuit affirmed this holding, which we contend is error under the decisions of the Supreme Court of the United States and the opinions of the Circuit Court of Appeals of the Eighth Circuit, and numerous other authorities.

Statement of Facts.

In the fifth paragraph of each petition, plaintiff alleges an oral waiver of the filing of written verified proofs of loss as required by the terms of the policy, by reason of statements made by the adjusters representing the companies, and after alleging the appoint-

ment of the adjusters, alleged that they came to the scene of the loss and viewed said property, and requested Plans and Specifications of the building and they allege as follows:

> "That said adjusters for said companies visited the scene of said fire and made examinations as to the value of the property destroyed and the circumstances surrounding said fire and had plaintiff to furnish them, said adjusters, with the items of said property so destroyed and the plans and specifications of the building, all of which was furnished by said plaintiff at the request of said adjusters as aforesaid, and said plaintiff was requested to and did furnish such assistance in this regard as it could to Mr. Frank Kebelman, who was the building contractor selected and appointed by said companies and their adjusters to make the estimate of such value of the property so destroyed and to obtain the correct information as to the condition of the property at the time of said loss as more fully appears by the letter from Fuller Adjustment Company dated February 3rd, 1926, copy of which is attached hereto and made a part hereof as Exhibit 'A'. Plaintiff further states that thereafter on the 27th day of February, 1926, which was on the fifty-sixth day after said fire, said adjusters, to-wit, Guy Fuller, Lloyd J. Mullen and Mr. Klein, met with the Board of said plaintiff, to-wit J. E. Quigley, G. D. Brooks and V. I. Langston, who were then said Board of said school, which meeting was held at Yale, Oklahoma, at the scene of said fire; that there was also present at said meeting said Mr. Frank Kebelman,

which meeting was held for the purpose of discussing the settlement and adjustment of said loss of plaintiff from said fire. That thereupon all of said insurance companies, acting through their said adjusters and agents, as aforesaid, at said meeting stated to the plaintiff, through its said Board, that they had made full and complete investigation as to said fire and the market value of the building and furniture and fixtures therein so destroyed by said fire and had obtained all and the correct information thereon and that there was no question as to the loss upon said furniture and fixtures in said sum of $3400.00 and that said insurance companies were then and there ready to pay said plaintiff that sum for its loss upon said furniture and fixtures, such payment to be pro rated among said insurance companies, stating at the same time that said furniture and fixtures were under valued for said insurance and were of a fair market value in excess of said sum of $3400.00. The said companies through their said adjusters and agents aforesaid at the same time stated that said building was over valued and could be replaced for the sum of approximately $53,000.00, and then said companies, through their said agents, offered the plaintiff the sum of approximately $56,000.00 as full payment for all of the loss to both said building and furniture and fixtures therein so destroyed by fire as aforesaid, payments to be pro rated among all of said insurance companies. The plaintiff declined to accept said amount and requested said insurance companies through their said adjusters to replace said building, inasmuch as said insurance companies contended that the same could be re-

placed for about $53,000.00 and had said Kebelman present with his figures to show that same could be replaced for about said amount. This, however, said insurance companies refused to do. Plaintiff further states that all of said property so destroyed by fire was destroyed at the same fire and all of the facts and circumstances relating to said furniture and fixtures also existed as to said building and said plaintiff had only given said insurance companies the same notice in the one instance as in the other, and said companies at said meeting offered to pay the full amount of the insurance on said furniture and fixtures as the same was undervalued, and the only question as to the said building was as to the value thereof and the replacement value, which said insurance companies contended was about $53,000.00 and which the plaintiff, through its Board, contended was of the value of $75,000.00; that the attention of said plaintiff and its Board was directed only as to the value of said building and the replacement value thereof and was the only matter discussed and as to which there was any disagreement at said meeting. That there was no objection made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that said insurance companies at said meeting by their said conduct in offering to pay the full amount of said insurance upon the furniture and fixtures, stating that the same was of a greater value than $3,400.00 at the time of the loss and their said acts and conduct in offering to pay the sum of $53,000 in payment of the loss of said building, stating and contending that said building was only of the value of about $53,-

000.00 at said time and could be replaced for said sum of about $53,000.00, thereby led the plaintiff to believe that the only matter in dispute between said plaintiff and said insurance companies was the market and replacement value of said building, the insurance companies contending on one hand that the market and replacement value was the sum of $53,000.00 and the said plaintiff contending that the same was $75,000.00 and this said defendant, together with the other insurance companies mentioned, has now, by reason of the facts aforesaid, waived the furnishing of proof of loss in strict accordance with the provisions of said policy and is estopped to set up and claim such failure as against the plaintiff in any particular. That said insurance companies through the examination and efforts of their said adjusters and through the assistance of said Board rendered at the request of said adjusters, obtained all of the information which could have been obtained had proof of loss been furnished in strict conformity to the policies of insurance and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss and that no other or further proof or information as to said loss was required but was waived.

"VII. Plaintiff alleges that it has performed all of the other conditions of said policy to be performed on its part, except the furnishing of said proof of loss which has been waived on the part of said defendant and as to which it is now estopped to set up such failure to the prejudice of any right of said plaintiff."

Each of the defendants demurred to this petition, the demurrer of the Concordia Insurance Company being shown at R. 19, and consisting of a general demurrer, while the demurrers of the other defendants are each identical, that of the National Fire Insurance Company being found at page 82, the grounds of demurrer being four in number and are as follows:

> "(1) That plaintiff's first amended petition wholly fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.
>
> "(2) That plaintiff's first amended petition herein is wholly insufficient to constitute a cause of action against this defendant for the reason that, as appears therefrom, the terms, provisions and conditions of the standard form of fire insurance policy therein sued upon were not complied with in that no proof of loss in the form required by such standard form policy was furnished to this defendant within the time and in the manner as required thereby; and in fact, has never been furnished as appears from said petition.
>
> "(3) That plaintiff's first amended petition herein is wholly insufficient to constitute a cause of action against this defendant in this, that the same does not state facts sufficient to establish a written waiver by this defendant of the requirements of said policy, and that under the decisions of the Federal Courts any waiver of the terms of the policy must be in writing, and it is not alleged in said first amended petition that said waiver was in writing; but that said plaintiff relies upon an oral

waiver which is not recognized under the Federal Rule.

"(4) That the original petition filed by the plaintiff did not state a cause of action for the reason that no proof of loss had been filed, and the plaintiff could not maintain an action without having filed such proof of loss, and that after the expiration of the statutory period of limitations, to-wit, one year, the plaintiff filed this first amended petition which sets up a cause of action based upon an alleged oral waiver, and that said first amended petition was not filed until after the running of the statute of limitations, and therefore, any cause of action on said policy is now barred by the statute of limitations."

The policies sued on in this case are Oklahoma Standard form policies, as provided by Section 6767, Compiled Oklahoma Statutes, 1921, and are on the only form of policy that can be written on schoolhouse property under the laws of the State of Oklahoma. Some of the policies were destroyed in the fire but plaintiff attaches to the petition in the case against the Royal Insurance Company a full copy of that policy (R. 39-42), and it was stipulated that the policies were all on the same form and contained the same terms and provisions as the Royal policy.

At page 39 of the record, we find the following provision contained in the insurance policy or contract sued on in this case:

"If fire occur the insured shall give immediate notice of any loss thereby in writing to

this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

2c

> "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

At page 41, we find the following provision of the policy contract:

> "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

At page 33, we find this provision with reference to waiver contained in the policy, wherein it is provided that all waivers must be in writing and signed by the propert officials of the company and attached to the policy. This provision is as follows:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this policy

except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The Circuit Court of Appeals for the Tenth Circuit in the instant case, on the question of waiver and estoppel (R. 435), says (italics ours):

"The next question goes to the sufficiency of appellee's pleas of waiver and estoppel. Those pleas are challenged as to both law and fact. As to the first it is said, oral waivers of proof of loss are conclusively precluded by the terms of the contracts; and as to the second, the pleas are bad in point of fact. As to the first, certain conditions of the policies are relied on. Those conditions and their requirements are these: If a fire occurred the insured was to give immediate notice of any loss thereby in writing to the company, and within sixty days after the fire renders a statement to the company signed and sworn to by the insured stating his knowledge and belief as to the time and origin of the fire, the interest of insured and all others in the property, the cash value of each item and the amount of loss thereon, all encumbrances thereon, all other insurance, a copy of all descriptions and schedules in all policies, any changes in the title, use occupation, location, possession or exposure of the

property since the issuing of the policy, and by whom and for what purpose the building and its several parts were occupied at the time of the fire. That the company should not be held to have waived any provision or condition of the policy by any requirement, act or proceeding on its part relating to the appraisal or any examination provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by the company, including an award by appraisers when appraisal has been required. No suit or action on the policy for the recovery of any claim shall be sustainable in any court until after full compliance by the insured with all the foregong requirements, nor unless commenced within twelve months after the fire. In any matter relating to this insurance no person unless duly authorized in writing shall be deemed the agent of insurer. No officer, agent or other representative of the insurer shall have power to waive any provision or condition of the policy except such as by the terms of the policy may be the subject of agreement endorsed thereon or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached thereto, nor shall any privilege or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached.

"The last noted provisions are aptly referable to certain contractual obligations as-

sumed by the insurers in the policies. For instance, the policy granted permission to make certain alterations, improvements and repairs and prohibited the making of other and more substantial work upon the building unless permission to do so is specifically covered by endorsement attached to the policy; no gasoline in excess of a certain amount could be kept or used on the premises unless permitted by endorsement on the policy. The building could not be abandoned for school purposes for an indefinite period without written permission endorsed on the policy. Permission was granted to use artificial or natural gas for fuel or light only when supplied through Public Service gas pipes. These all appear to be conditions affecting the insurer's risk, contractual obligations, and could not be waived except in the manner required, that is, by endorsement in writing.

"We pass now to a summary of the challenged pleas. The amended complaints alleged that on January 2, 1926, and within two or three hours after the fire had destroyed the building and furniture and fixtures therein, the plaintiff notified appellants' agents of the fire and the extent of the damage and destruction with the request that they notify their companies. That within two or three days thereafter the appellants selected named persons to represent them and authorized such persons to investigate the fire and make estimates as to the value of the property destroyed and settle for the loss; that these adjusters for the insurers visited the scene of the fire and made examinations as to the value of the property destroyed and the circumstances surrounding

the fire, and had plaintiff furnish them with the items of the property destroyed, the plans and specifications of the building, which plaintiff furnished, and requested plaintiff to furnish assistance to a building contractor selected and appointed by the insurers and their adjusters, who was to make estimates of the value of the property destroyed and collect information as to the condition at the time of the loss; that thereafter on the 27th day of February, 1926, which was the 56th day after the fire, the said adjusters and the members of plaintiff's board of trustees held a meeting at the scene of the fire; that said building contractor was at said meeting; that said meeting was held for the purpose of discussing the settlement and adjustment of the loss sustained by plaintiff; that thereupon all of the insurers, acting through their said adjusters and agents, stated to plaintiff's board that they had made full and complete investigation as to the fire and the market value of the building, and furniture and fixtures therein destroyed by said fire and had obtained all and the correct information thereon, that there was no question as to the loss upon the furniture and fixtures in the sum of $3,400.00 and that appellants were then and there ready to pay plaintiff that sum for its loss on the furniture and fixtures; that said insurers, through their adjusters and agents, at the same time stated that said building was overvalued and could be replaced for the sum of approximately $53,000, and then offered the sum of approximately $56,000 as full payment for all of the loss of both said buildings and furniture and fixtures destroyed; that plaintiff declined to accept said amount and requested the insur-

ance companies, through their adjusters, to replace said building, this however the insurers refused to do; that plaintiff's board at said meeting contended that the value of the building was $75,000; that the value of the building and its replacement cost were the only matters discussed as to which there was any disagreement; no objection was made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that the insurers at said meeting, by their conduct in offering to pay the full amount of insurance upon the furniture and fixtures and in offering to pay the sum of $53,000 for the loss of the building, led the plaintiff to believe that the only matter in dispute was the market and replacement value of the building, the appellants contending on the one hand that the market and replacement value was the sum of $53,000 and the plaintiff contending that the value was $75,000, and that by reason of the facts stated appellants waived the furnishing of proofs of loss in strict accordance with the provisions of the policies and are estopped to set up and claim such failure to furnish proofs; that appellants, through the examinations and efforts of their adjusters and the assistance of plaintiff's board rendered at the request of the adjusters obtained all the information which could have been obtained had proof of loss been furnished in strict conformity to the policies and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss.

"*After giving due consideration to all requirements of the policies to which we have made reference in above summary of their con-*

tents, we think the weight of authority is opposed to the contention that waivers of proof of loss in these cases could be made only in writing endorsed upon or attached to the policies. They could not be furnished until after the loss had occurred and liability of the insurers if any had accrued. The requirement was a *condition subsequent* and only provided means, if accepted as to verity, by which insurer's liability and its extent could be ascertained. But insurers were not bound to accept them, they could make their own investigation of the facts called for in the proof and stand on their conclusions so reached, in disregard of proof furnished. The policies provided that the loss should not become payable until sixty days after satisfactory proof of loss had been received by the insurer. Had the insurers stood by for the sixty days after the fire, during which time the insured might make proof of loss and no proof had been forthcoming, the insured would have been without right of recovery; or had proof been furnished within that time, the insurers, if not satisfied with the proof furnished, still had sixty days within which they could make their own investigation as to their liability and the extent thereof, before the loss became payable. That afforded them ample protection. They chose to ignore both alternatives. They sent their agents and adjusters to the scene of the fire within a few days after it occurred to make investigations and settlement with the insured. They called on the insured for assistance in making their investigations. That assistance was given. Its thoroughness cannot be doubted. All material facts must have been discovered. At least the pleas

were broad enough to admit proof they were discovered; and they were full enough to satisfy insurers in making a substantial offer of settlement on the 56th day after the fire $8,400 less than the judgments recovered. Under a policy with like conditions, in substance, to those here relied on, the Circuit Court of Appeals for the Ninth Circuit said, in Twin City Fire Ins. Co. *v.* Stockmen's National Bank, 261 Fed. 470, 476:

"'Clauses in insurance policies, prohibiting waiver unless the same is indorsed thereon, refer only to the provisions which enter into the contract of insurance, and they do not affect conditions which are to be performed after loss, such as furnishing proof of loss and giving notice. These may be waived, either by expressed words or by conduct inconsistent with an intention to enforce a strict compliance with the conditions, and which conduct is calculated to lead the insured to believe that the insurers do not intend to require such compliance. Insurance Co. *v.* Norton, 96 U. S. 234, 24 L. Ed. 689; Burlington Ins. Co. *v.* Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Wheaton *v.* Insurance Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Rokes *v.* Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Kenton Ins. Co. *v.* Wigginton, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81; McCollough *v.* Home Ins. Co., 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862. And an adjuster sent to adjust a loss presumably has authority to waive proof of loss. Slater *v.* Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 181; Popa *v.* Northern Ins. Co., 192 Mich. 237, 158

N. W. 945; Milwaukee Mechanic's Institute *v.* Fuquay, 120 Ark. 330, 179 S. W. 497; Lusk *v.* American Cent. Ins. Co., 80 W. Va. 39, 91 S. E. 1078; Wholley *v.* Western Assurance Co., 174 Mass. 54 N. E. 548, 75 Am. St. Rep. 314; Teasdale *v.* Insurance Co., 163 Iowa 596, 145 N. W. 284, Ann. Cas. 1916A, 591.'

"This ruling was adhered to by that court in Alliance Ins. Co. *v.* Enders, 293 Fed. 485. The Circuit Court of Appeals for the Sixth Circuit is in accord with the Ninth. In Continental Ins. Co. *v.* Fortner, 25 F. (2d) 398, 402, it said on the subject:

"'It is the prevailing rule that a clause in a policy of insurance prohibiting any waiver unless indorsed thereon refers only to those provisions of the policy which enter into and form part of the contract of insurance, and which may properly be designated as conditions; it has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proofs.'"

NOTE.—The case of Insurance Co. *v.* Norton, 96 U. S. 234, 24 L. Ed. 689, relied upon as the basis of the decision in this case, has no application in that said case had reference to the extension of the time of payment of a promissory note given for the premium and was not a construction of the terms and provisions of the policy contract.

The petition for writ of certiorari, briefly stated, is as follows:

1. That said judgments purport to and do decide an important question of local law, to

wit, the construction of a State statute on the question of interest, diametrically opposed to the construction placed on said statute by the Supreme Court of the State of Oklahoma in the case of American Eagle Fire Insurance Company *v.* Lively, 142 Okla. 246, 286 Pac. 797, decided on April 8, 1930, and in opposition to the decisions of the Supreme Court of the State of Oklahoma, in the following cases:

St. Paul Fire & Marine Insurance Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702;
City of Chickasha *v.* Hollingsworth, 56 Okla. 341, 155 Pac. 859;
Speed *v.* McMurray et al., 73 Okla. 325, 176 Pac. 506;
Midland Valley Railroad Co. *v.* Price, 127 Okla. 106, 260 Pac. 26;
Curtis-Gartside Company *v.* Aetna Life Insurance Co. (Okla.), 160 Pac. 465.

That said Circuit Court of Appeals refused to follow the statute of Oklahoma as construed in the above cases and based its decision upon another statute of the State of Oklahoma, to-wit, Section 5977, Compiled Oklahoma Statutes, 1921, which was inapplicable to this case. That the Supreme Court of Oklahoma has consistently held that interest runs from the date of judgment, which the Circuit Court of Appeals refused to follow, and decided otherwise.

2. That said judgments are in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, out of which the Circuit Court of Appeals for the Tenth Circuit was formed, namely, the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case

of Scottish Union & National Insurance Company *v.* Encampment Smelting Company, 166 Fed. 231, said case laying down the rule that the provision of the fire insurance policy requiring proof of loss to be filed within sixty days is a condition precedent to the right of action and can only be waived in writing, whereas, the opinion of the Circuit Court of Appeals for the Tenth Circuit held that said proof of loss could be orally waived.

3. Said judgments purported to decide an important question of general law in a way which is untenable and in conflict with the great weight of authority in that the Circuit Court of Appeals in the instant case holds that there can be an oral waiver of a proof of loss under the terms and provisions of the standard fire insurance policy sued on in this case, whereas, it is a well-settled principle of law in the Federal Courts that where a policy or contract of insurance contains a standard provision with reference to waiver, parol evidence cannot be introduced to establish waiver, and that there can be no waiver of any of the conditions or provisions except such waiver be in writing, signed by the insurer, or its duly authorized agent.

4. That said judgments purport to decide an important question of Federal law, to-wit, whether or not there can be an oral waiver of the provisions of a standard fire insurance policy requiring proof of loss to be filed in sixty days unless the time thereof be extended in writing by the company, which question has not been, but should be, settled by this Court.

In our brief in support of these assignments contained in the petitions for writ of certiorari, we cover them under two propositions:

I.

"That the judgments and opinions of the United States Circuit Court of Appeals for the Tenth Circuit purport to construe a State Statute of the State of Oklahoma different from and opposed to the construction given it by the Supreme Court of Oklahoma.

II.

"The judgments in question are in conflict with the rule laid down in Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., 166 Fed. 231 (8th Cir.), and other Federal decisions holding that the provisions of a fire insurance policy requiring furnishing of proof of loss within sixty days after the date of loss is a condition precedent to the right to maintain action on the policy, and can be waived only in writing as provided by the policy sued on."

First Proposition.

Oklahoma Statutes on the Question of Interest

Section 5972, Compiled Oklahoma Statutes, 1921, is as follows:

"5972. Interest upon damages. Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover

> interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

Section 5977, Compiled Oklahoma Statutes, 1921, is as follows:

> "5977. Breach of obligation to pay money. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

Oklahoma Decisions on the Question of Interest.

While it is true that there is an apparent conflict in some of the decisions of the Supreme Court of Oklahoma, yet when fully analyzed, we do not believe that there is any real conflict.

In the case of St. Paul Fire & Marine Ins. Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702, decided April 29, 1929, it was held:

> "4. Interest cannot be recovered upon unliquidated damages, where it is necessary for a judgment or verdict to be had in order to ascertain the amount of the same."

At page 270 of the Oklahoma Report, the Court in the opinion says:

> "The court instructed the jury that if it found for the plaintiff that it allow him interest at 6 per cent from December 1, 1916, on the amounts found, and it is urged by the defendant that said instruction is violative of section 2848, Rev. Laws of 1910. In the case of City of

Chickasha *v.* Hollingsworth, 56 Okla. 341, 15 Pac. 859, this court held that interest was not recoverable on unliquidated damages, where it was necessary for a judgment on verdict to be rendered in order to ascertain the amount of such damage. The instruction was therefore erroneous, and the judgment was excessive in the small amount of the interest so allowed, which is less than $5.

"The judgment will therefore be modified by deducting therefrom interest on the damages allowed from December 1, 1916, to the date of the verdict, which was April 17, 1917, and as so modified, will be affirmed."

In Curtis & Gartside Co. *v.* Aetna Life Ins. Co., 58 Okla. 470, 160 Pac. 465, decided October 10, 1916, it was held:

"4. The extent of the company's liability under such policy is governed by the terms of the contract, and is thereby limited to $5,000, and the expense of defending the action against the assured, if the company elects to defend, and the interest accruing on the judgment recovered in such action, pending an appeal therefrom, is not a part of such expense."

In the case of Midland Valley Ry. Co. *v.* Price, 127 Okla. 106, 260 Pac. 26, decided October 11, 1927, it was held:

"9. In an action for the death of 22 head of steers alleged to have been caused by the negligence of a common carrier, and for expenses incurred in the burial and disposition of said steers, and the damages for the loss of the

steers are based upon the market value, interest may be recovered prior to judgment, under sections 5972 and 5973, C. O. S. 1921."

(NOTE.—This interest was based upon the fact that cattle on a particular day had a particular market value.)

In the case of Speed *v.* McMurray, 73 Okla. 325, 176 Pac. 506, decided April 20, 1918, it was held:

"3. Interest cannot be recovered upon unliquidated damages, where it is necessary for a verdict to be had in order to ascertain the amount of the same."

In the case of Hartford Fire Ins. Co. *v.* Barnard, 99 Okla. 24, 221 Pac. 1011, decided December 11, 1923, it was held:

"1. In an action upon a fire insurance policy for unliquidated damages, if the damages are capable of ascertainment by computation, by reason of the property destroyed by fire having a well-established market value, the jury may return its verdict for interest on the amount of plaintiff's recovery dating from the time which the defendant ought to have satisfied the claim."

(NOTE: This is an action upon a fire insurance policy for the loss of an automobile which had a market value on the day of the fire.)

In the case of City of Chickasha *v.* Hollingworth, 56 Okla. 341, 155 Pac. 859, decided March 14, 1916, which was an action for breach of a contract to perform certain work and furnish certain machinery, the court held:

"2. Interest cannot be recovered upon unliquidated damages, where it is necessary for a judgment or verdict to be had in order to ascertain the amount of same."

In the case of American Eagle Fire Ins. Co. *v.* Lively, 142 Okla. 246, 286 Pac. 797, decided April 8, 1930, and in which the plaintiff seeks to recover upon a fire insurance policy for the loss of household goods and a library, the court, with reference to interest, held:

"3. Interest is not recoverable on unliquidated damages requiring judgment or verdict to ascertain amount thereof (Comp. St. 1921, sec. 5972).

In the body of the opinion, the court says:

"It is next contended that the trial court erred in allowing plaintiff interest prior to judgment—interest was allowed from date of filing suit. St. Paul Fire & Marine Ins. Co. *v.* Robison, 72 Okl. 269, 180 p. 702, and Schaff *v.* Hudgins, 96 Okl. 173, 221 p. 90, are cited in support of this contention. In our opinion these cases are controlling. Section 5972, C. O. S. 1921, provides: 'Any person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.'

> "Considering the nature of the property destroyed and the difficulty in ascertaining the actual or fair value thereof, we think interest should not have been allowed until the claim was reduced to judgment."

In the instant case, the loss was of a school house. It had no market value. It was not such property as was subject to barter and sale.

It is a well established principle of Federal law, and which we think is elementary, that the Federal Court is bound by the decisions of the State Court as to the construction of a statute by such State Court. This principle of law is established in the following cases:

Louisville Gas & Electric Co. *v.* Coleman, 48 Sup. Ct. 423, 227 U. S. 32, 72 L. Ed. 770;

Chicago, M., St. P. & P. R. Co. *v.* Risty, 48 Sup. Ct. 396, 276 U. S. 567, 72 L. Ed. 703;

Stebbins *v.* Riley, 45 Sup. Ct. 424, 268 U. S. 137, 69 L. Ed. 884;

Central Union Telephone Co. *v.* City of Edwardsville, 46 Sup. Ct. 90, 269 U. S. 190, 70 L. Ed. 229;

New York Life Insurance Co. *v.* Dunlevy, 214 Fed. 1, 130 C. C. A. 437, affirmed 36 Sup. Ct. 613, 241 U. S. 518, 60 L. Ed. 1140.

That decisions of a State Court of last resort construing a State statute will be followed by United States Courts, see

People's National Bank of Lynchburg *v.* Marye, 107 Fed. 570; decree modified and affirmed 24 Sup. Ct. 68, 191 U. S. 272, 48 L. Ed. 180,

and that the construction placed on a State statute by the State Court of last resort is binding on the Federal Courts, see further

Hunter *v.* City of Pittsburgh, 28 Sup. Ct. 40, 207 U. S. 161, 52 L. Ed. 151;

Bunch *v.* Cole, 44 Sup. Ct. 101, 263 U. S. 250, 68 L. Ed. 290.

Second Proposition.

Waivers of Proof of Loss Must be in Writing.

The distinction made by the Circuit Court of Appeals of the Tenth Circuit in its opinion in these cases is in substance that there can be no oral waiver of the terms, provisions and conditions of a fire insurance policy as to forfeiture prior to loss, but that after the loss, there can be an oral waiver. However, the contract of insurance adopted by the Legislature of the State of Oklahoma, as Section 6767 Compiled Oklahoma Statutes, 1921, does not make any such distinction, and in this connection, we call attention to the provision of the policy found in the record at page 33:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on the back hereof, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and

> as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

And said policy contains the further provision:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Prior to the organization of the Circuit Court of Appeals for the Tenth Circuit, the State of Oklahoma was embraced within the jurisdiction of the Circuit Court of Appeals for the Eighth Circuit, and that Court passed upon the very questions involved in the instant case, in Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., decided December 8, 1908, 166 Fed. 231, and which case continued the law of the Oklahoma jurisdiction until the decision in the instant case by the Circuit Court of Appeals for the Tenth Circuit. In that case, the Eighth Circuit held:

> "1. Where a policy of fire insurance expressly provided that in case of loss a written and verified proof of loss should be made by the insured containing certain stated and detailed information, such proof of loss is an essential condition precedent to the company's liability, unless

waived; and where it further provided that no officer, agent, or other representative of the company should have power to waive any of its conditions except in writing indorsed thereon or attached thereto, the failure to make such proof of loss is not excused by a claimed waiver, not in writing, by an agent of the company not shown to have any express authority to make it and whose action was not ratified by the company."

The Court, in its statement of facts, pages 232 and 233, says:

"This was a suit at law to recover on two policies of fire insurance executed by the insurance company, defendant below, one for $3,500, under date December 27, 1906, insuring plaintiff's building and machinery, therein in process of construction against loss by fire until June 27, 1907, the other for $2,500, dated January 17, 1907, insuring the machinery alone against loss by fire until July 17, 1907. The building and machinery were totally destroyed by fire on May 10, 1907, prior to the expiration of the policies. The policies each contained the following provisions: (1) 'It is warranted that the premises hereby insured shall not be occupied for a longer period than thirty days, without special permission being granted in writing hereon, and re-adjustment of rate.' (2) 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy. * * *' (3) 'If fire occur the insured shall give immediate notice of any loss

thereby in writing to this company, * * * and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.' (4) 'The loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.' (5) 'This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions

as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.'

"The amended complaint stated the facts concerning the issue of the policy, the destruction of the property by fire, and other facts entitling plaintiff to recover; but, by way of anticipating and avoiding a possible defense, averred that plaintiff duly performed each and every act and condition required of it by the terms of the policy, except that the defendant expressly waived a literal compliance with the provision of the policy requiring the proof of loss, and that said waiver occurred in the following manner: 'After the defendant had notice of the loss by fire hereinbefore mentioned, and long prior to the time limited within the provision of said policy, hereinbefore referred to, it caused its state agent for the states of Colorado and Wyoming, to wit, one O. E. Lane, to visit the scene of said fire, in company with various insurance adjusters for other companies holding insurance on said property, and the said O. E. Lane did then and there enter into and upon the ascertainment and adjustment of the loss occasioned by said fire, and did then and there personally,

at the instance of said defendant company, obtain and receive full, complete and accurate knowledge with respect to the said fire, and the loss occasioned thereby, and did report the same to the said company, who did then and there, and within the period limited by the terms and provisions of the said policy, have and receive full, accurate, and complete knowledge with respect to said loss, in each and every particular required by the terms of said policy, and otherwise, from the said Lane, so appointed by the said defendant for that purpose as aforesaid.' The defendant answered, and, amongst other things, denied that plaintiff had duly performed the conditions required of it by the policy, and particularly denied that defendant had waived a literal compliance with the provisions of the policy requiring proofs of loss within 60 days after the fire. Defendant also pleaded that plaintiff, without the consent of the defendant written upon or attached to the policy, and without readjustment of rate, occupied the premises described in the policy and used the machinery therein for a longer period than 30 days, whereby the policy became null and void.

"Upon these issues the cause was tried to the court without the intervention of a jury, and resulted in a judgment in favor of plaintiff. The Circuit Court made no special finding of facts; but the defendant, by motion to strike out evidence, and by requests for a judgment in its favor on all the evidence produced and exceptions taken to the rulings of the court thereon, raised two important questions of law which it now contends were decisive of the case and required a judgment in its favor. These questions are (1) whether there was any competent evi-

dence of waiver of the proofs of loss required by the policies, and (2) whether plaintiff occupied the building without the consent of the defendant, and without readjustment of the rate, for the period in excess of 30 days, and thereby committed a fatal breach of one of the warranties contained in the policy."

In the body of the opinion, the Court says:

"It is not and cannot be disputed that a failure to furnish proofs of loss in cases like the present constitutes a breach of a condition precedent to recovery. Plaintiff, in its petition, instead of claiming that it had performed this condition, admitted in effect that it had not done so, and justified its failure by alleging that defendant had waived its performance. Proof of the waiver consisted of oral evidence only. It tends to show that an agent of defendant company, a Mr. Lane, by its direction visited the scene of the fire soon after its occurrence in company with insurance adjusters of other insuring companies for the purpose of making an independent examination of the loss and reporting to defendant company his conclusion; that he made such examination and report, prepared for plaintiff a proof of loss under a third policy which defendant company had issued on May 5, 1907, not as a builder's risk, like the two policies in suit, but a straight term policy upon the premises as a completed structure; that Mr. Cobb, vice president of the plaintiff company, signed the proof so made out by the agent, and that the claim under that policy was paid by defendant company; that the policies in suit were two of

many which had been issued by defendant and other insurance companies on the risk, and that other proofs of loss under other policies were made out on the same occasion and signed by Mr. Cobb; that the latter, at the time of signing, believed the proofs so signed by him included proofs under the two policies in suit."

At page 234, the Court further says:

"We are relieved by the decision of the Supreme Court of the United States in the case of Northern Assurance Company *v.* Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, from much responsibility in this case. Prior to that decision there had been a diversity of views expressed by courts of the United States, both national and state, on the subject of waiver of provisions and conditions of policies of insurance by agents. In that case the Supreme Court, by Mr. Justice Shiras, exhaustively reviewed former decisions, and announced conclusions which have been since then adhered to by that court and necessarily followed by all other courts of the United States. He there declared that the principle governing contracts in general requiring them, if in writing and unambiguous, to speak for themselves, is applicable to cases of insurance contracts as fully as contracts on other subjects. He there said:

"'That it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance

policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; * * * that, where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.' "

At page 235 of the opinion, Mr. Justice Adams, continuing, says:

"The clause of the policy under consideration by the Supreme Court was exactly the same as that limiting the power of an agent in the present policies, namely:

" 'No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy

exist or be claimed by the insured unless so written or attached.'

"In Hagan *v.* Scottish Ins. Co., 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229, and Hartford Fire Ins. Co. *v.* Wilson, 187 U. S. 467, 478 Sup. Ct. 189, 47 L. Ed. 261, the Supreme Court reasserted the conclusions stated in the Northern Assurance Company Case, and in the last-mentioned case said:

"'There is no attempt, by parol testimony, to contradict any stipulations of the policy, something which we have recently held cannot be done.'

"We have scrupulously recognized and applied that doctrine in the following cases: Modern Woodmen of America *v.* Tevis, 54 C. C. A. 293, 117 Fed. 369; Supreme Council of Royal Arcanum *v.* Taylor, 57 C. C. A. 406, 121 Fed. 66; Atlas Reduction Co. *v.* New Zealand Ins. Co., 71 C. C. A. 21, 138 Fed. 497, 9 L. R. A. (N. S.) 433; Connecticut Fire Ins. Co. *v.* Buchanan, 73 C. C. A. 111, 141 Fed. 877, 4 L. R. A. (N. S.) 758; Mulrooney *v.* Royal Ins. Co. (C. C. A.) 163 Fed. 833.

"The doctrine is a reasonable one. It tends to promote certainty in the proof of transactions, and to inculcate a salutary and wholesome regard for the very terms of a contract when deliberately put in writing by competent parties. There is, therefore, no escape from the conclusion that, as Agent Lane was not shown to have any express authority to waive the condition requiring proofs of loss, and as no such waiver was written upon or attached to the policies, there was in contemplation of law no waiver at all, unless the defendant company,

with full knowledge of the fact that an agent had attempted to waive the condition and of what he had said and done in doing so, ratified his action. No claim of ratification is made except one based on the fact that defendant paid the policy issued May 5, 1907. As proof of loss had been furnished under this policy, and thereby a legal liability had been established, we perceive no reason why the payment of that demand should dispense with a condition precedent to liability on other and different policies. Moreover, as the record is silent concerning knowledge by defendant's general officers concerning anything said or done by the agent, Lane, claimed to constitute a waiver, there is and can be no ratification."

In the case of Northern Assurance Co. *v.* Grand View Building Ass'n, 46 L. Ed. 213, 183 U. S. 308, it was held:

"1. An insurance company cannot be deemed to have waived a condition in a policy of fire insurance rendering it void in case other insurance had been or should be made upon the property unless by agreement indorsed thereon or attached thereto, because its agent had notice or knowledge of the existence of other insurance in another company at the time he delivered the policy and received the premium, where such policy also provided that 'no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions or conditions no officer, agent,

or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.' "

In the body of the opinion the court says:

"We do not consider it necessary or profitable to examine in detail the decisions of the circuit courts or of the circuit courts of appeals. It is sufficient, for our present purpose, to say that the circuit court of appeals for the seventh circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally (United Firemen's Ins. Co. *v.* Thomas, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406), and that the court of appeals for the eighth circuit, in the present case, has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence, and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. 41 C. C. A. 207, 101 Fed. 77.

"In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari.

"As to the fundamental rule, that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf.

"Policies of fire insurance in writing have always been held by this court to be within the protection of this rule."

And at pages 234-35, the court says:

"What, then, are the principles sustained by the authorities, and applicable to the case in hand?

"They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and

reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispenses with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

In the case of Imperial Fire Ins. Co. *v.* County of Coos, 151 U. S. 452, 38 L. Ed. 231, it was held:

"1. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss.

"3. Contracts of insurance if they are clear and unambiguous, are to be taken and understood in their plain, ordinary and popular sense.

"4. Where the condition in the policy is that it shall be void and of no effect if 'mechanics are employed in the building, altering, or repairing the premises named herein', without notice to or permission of the insurance company, its violation by the insured terminates the contract of the insurer, and it cannot be thereafter made liable on the contract, without having waived that condition, merely because in the opinion of the court and the jury the alterations and repairs of the building did not, in fact, increase the risk."

"5. An instruction of the court to the jury which gave no validity or effect to such condition and its breach, but made it depend upon the question whether the acts done in violation of it, in fact increased the risk, and whether such increased risk was operative at the date of the fire, was erroneous."

In the opinion, delivered by Mr. Justice Jackson, the Court says:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and where called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the

6c

measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.

"It is settled, as laid down by this court in Thompson *v.* Phenix Ins. Co. of Brooklyn, 136 U. S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their

terms are to be taken and understood in their plain, ordinary, and popular sense.

"It is entirely competent for the parties to stipulate, as they did in this case, 'that this policy should be void and of no effect, if, without notice to the company, and permission therefor indorsed hereon, * * * the premises shall be used or occupied for the purposes stated herein; * * * or the risk be increased by any means within the knowledge or control of the assured; * * * or, if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling houses, where not exceeding five days in one year are allowed for repairs.'

"These provisions are not unreasonable. * * *"

In the case of Jessie Riddlesbarger *v.* Hartford Fire Ins. Co., 19 L. Ed. 257, this Court, in passing upon the limitation clause in the policy, held:

> "A condition in a policy of insurance against the maintenance of any action to recover a claim upon the policy, unless commenced within twelve months after the loss, is valid."

In the case of Lumber Underwriters of New York *v.* Rife, 237 U. S. 605, 59 L. Ed. 1141, this Court held:

> "A fire insurance company cannot be deemed to have waived a breach of the warranty in a policy insuring lumber that a continuous space of 100 feet shall be maintained between the lumber and the mill of the assured, because, during the life of an earlier policy, of which the one in question is a renewal, the insurance company

learned that there were permanent structures between some of the lumber piles and the mill, reducing the clear space in that direction to less than 100 feet, where the policy requires any waivers to be written upon or attached to that instrument."

Mr. Justice Holmes, in delivering the opinion of the Court, said:

"When a policy of insurance is issued, the import of the transaction, as everyone understands, is that the document embodies the contract. It is the dominant, as it purports to be the only and entire, expression of the parties' intent. In the present case this fact was put in words by the proviso for the indorsement of any change of terms. Therefore when, by its written stipulation, the document gave notice that a certain term was insisted upon, it would be contrary to the fundamental theory of the legal relations established to allow parol proof that at the very moment when the policy was delivered that term was waived. It is the established doctrine of this court that such proof cannot be received. Northern Assur. Co. *v.* Grand View Bldg. Asso. 183 U. S. 308, 46 L. Ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. *v.* Grand View Bldg. Asso., 203 U. S. 106, 107, 51 L. Ed. 109, 111, 27 Sup. Ct. Rep. 27; Connecticut F. Ins. Co. *v.* Buchanan, 4 L. R. A. (N. S.) 758, 73 C. C. A. 111, 141 Fed. 877, 883. See Penman *v.* St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. Ed. 493, 30 Sup. Ct. Rep. 312; Aetna L. Ins. Co. *v.* Moore, 231 U. S. 543, 559, 58 L. Ed. 356, 366, 34 Sup. Ct. Rep. 186. There is no hardship in this rule. No rational theory of contract can be

made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party. The assured also knows better than the insurers the condition of his premises, even if the insurers have been notified of the facts. If he brings to the making of his contract the modest intelligence of the prudent man, he will perceive the incompatibility between the requirement of 100 feet clear space and the possibilities of his yard, in a case like this, and will make a different contract, either by striking out the clause or shortening the distance or otherwise, as may be agreed. The distance of 100 feet that was written into this policy was not a fixed, conventional formula that there would be trouble in changing, if the insured would pay what more, if anything, it might cost. Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause.

"The plaintiffs try to meet these recognized rules by the suggestion that after a contract is made, a breach of conditions may be waived, 'void' only meaning voidable at the option of the insurers (Grigsby *v.* Russell, 222 U. S. 149, 155, 56 L. Ed. 133, 136, 36 L. R. A. (N. S.) 642, 32 Sup. Ct. Rep. 58, Ann. Cas. 1913B, 863): * * *"

In the case of Mrs. Anna E. Penman *v.* St. Paul Fire & Marine Ins. Co., 216 U. S. 311, 54 L. Ed. 493, it was held:

> "2. A condition avoiding a policy of fire insurance if blasting powder be kept on the premises is not waived because the insurer's agent knew that the building insured was to be occupied by miners, whose custom it was to keep blasting powder in their homes, and for that reason charged more than the usual rate, where the policy guards against any acts of waiver or change of its conditions by providing that such waiver or change, to be effective, shall be written upon, or attached to, the policy."

In the body of the opinion, at page 498, the Court said:

> "We think also that the policy furnishes the only way by which its term can be waived. It provides against modifications by the usage or custom of trade or manufacture. It guards against any acts of waiver of its conditions or a change of them by agents. It provides that such waiver or change 'shall be written upon or attached' to the policy. The company could have used no words which would have been more explicit. There is no ambiguity about them. Parol testimony was not needed nor admissible to interpret them. They constituted the contract between the company and the insured. No agent had power to change or modify the contract except in the manner provided. This was decided in Northern Assur. Co. *v.* Grand View Bldg. Asso. supra. Any other ruling would take from contracts the certain evidence of their

written words, and turn them over for meaning to the disputes of parol testimony."

The case of Royal Insurance Co. *v.* Ruperto Martin, as Executor of the will of Francisco Martin, deceased, 192 U. S. 149, 48 L. Ed. 385, cited by counsel in their brief, is not in point in this case for the reason that in that case, the policy provided that the company might demand that proof be furnished showing that the loss was not occasioned by or connected with, but was from causes independent of, such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law, and holds that as the company made no such demand and denied liability, it thereby waived that proof provided for in the policy. By the terms of the contract itself, the company was not entitled to the proof specified unless they made demand for it.

In the case of D. P. Thompson *v.* Phœnix Ins. Co. of Brooklyn, 136 U. S. 287, 34 L. Ed. 408, cited by counsel, in an opinion delivered by Mr. Justice Harlan, a question of fraud is involved. It has to do with the period of limitation in which the action may be brought under the policy, and the case holds that where the insurance company tolls the insured on, promising payment from time to time, leading him to believe that they are going to pay without litigation until the statutory period of limitation has run, under those conditions the action may be maintained. This is also the universal rule and is supported by the decisions of the Supreme Court of Oklahoma, but this decision and the theory upon which the cases holding to that effect

are based is that the insurance company cannot, by its wrongful act or by fraud, gain an advantage to itself.

The provision of the Standard Fire Insurance policy requiring proofs of loss to be filed within sixty days unless the time is extended in writing by the insurer, has been held in numerous cases in the Federal Court to be a valid and binding provision, and that the filing of the proof of loss is a necessary prerequisite to the right to maintain an action upon the policy. The leading case on this subject, in the jurisdiction of which Oklahoma is a part, is the case of Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., 166 Fed. 231.

In the case of Missouri-Pacific Ry. Co. *v.* Western Assurance Co., 129 Fed. 610, (Cir. Ct. D. Kans. 1st Div.), the Court, passing on the question of waiver of proof of loss, held:

> "2. Where a fire policy provided that proofs of loss should be furnished within 60 days from the date of loss, and declared that an extension of such period should be evidenced by a writing attached to or indorsed on the policy, and that the insurer should not be held to have waived any forfeiture provided for in the policy, or any condition thereby imposed on insured by any proceeding on the part of the company relating to appraisal or examination of the property insured, a forfeiture for assured's failure to furnish proofs of loss within the time required, in the absence of such written extension, was not waived by an acknowledgment of notice of loss and the commencement and continuation of negotiations for settlement without requiring proofs to be made."

This opinion was by District Judge Pollock and is based upon the holding in the case of Imperial Assurance Co. *v.* County of Coos, *supra*, and Northern Assurance Co. *v.* Grand View Bldg. Ass'n, *supra*, and in this case, the Court holds that the case of Thompson *v.* Phenix Insurance Co., 136 U. S. 287, 34 L. Ed. 408, in no wise conflicts with its decision. This latter case was cited by counsel and we think the same inapplicable to the issues here involved.

In the case of San Francisco Savings Union *v.* Western Assurance Co., 157 Fed. 695, the Circuit Court of the Northern Division of California in an opinion by District Judge Van Fleet, it was held:

> "Where an insurance contract contained a condition printed on the back of the policy that 'no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements', and among such requirements was one that proof of loss should 'be made within sixty days after the fire unless such time is extended in writing,' a complaint on the policy does not state a cause of action which shows on its face that proof of loss was not made until six months after the fire, and alleges no extension of time nor waiver."

And this District Judge, in rendering his opinion, bases it upon the decision of the United States Supreme Court in the case of Imperial Assurance Co. *v.* County of Coos, *supra*, and upon the case decided by Judge Pollock, *supra*.

In the case of Bank of South Jacksonville *v.* Hartford Fire Ins. Co., 1 Fed. (2d) 43, the District Court for the Southern District of Florida held:

> "1. As to effect of clause of policy requiring proof of loss within 60 days after loss, unless time be extended in writing by insurer, a federal District Court is governed by general law, and decision of the state Supreme Court is not binding on it.
>
> "2. Under a policy requiring proof of loss within 60 days after loss, unless such time be extended in writing by insurer, and providing that no action on it shall be sustainable unless assured shall have fully complied with all its requirements, failure to make proof of loss in stipulated time, without obtaining written extension of time, is fatal to recovery."

This decision is based upon the case of Northern Assurance Co. *v.* Grand View Bldg. Ass'n, *supra*, upon the case of Atlas Reduction Co. *v.* New Zealand Insurance Co., *supra*.

In the case of Harris *v.* North British & Mercantile Ins. Co. (5th Cir.) 30 Fed. (2d) 94, the court held:

> "1. Requirements of fire policy to effect that insured must furnish proof of loss within sixty days held to constitute a condition precedent to right of insured to maintain suit thereon as being a contractual limitation of time upon the right to make proof of loss, as well as upon the right to maintain suit without any question of forfeiture.
>
> "2. Where time of compliance with condition of proof of loss under fire policy within 60 days

> was made an essential element thereof, insured cannot show full compliance with such requirement after lapse of 60 days from date of fire."

This opinion is based upon the holding of this Court in Imperial Assurance Co. *v.* County of Coos, *supra;* upon that of the Circuit Court in San Francisco Savings Union *v.* Western Assurance Co., *supra*, and Missouri Pacific Ry. Co. *v.* Western Assurance Co., *supra;* and a writ of certiorari was attempted from the decision of the Fifth Circuit Court of Appeals in Harris *v.* North B. & M. Ins. Co., 30 Fed. (2d) 94, but denied by this Court in Lamar Harris *v.* North British & Mercantile Ins. Co., 73 L. Ed. 401.—U. S.—

In the case of Hartford Fire Ins. Co. *v.* Empire Coal Mining Co., the Circuit Court of Appeals for the Eighth Circuit, 30 Fed. (2d) 794, held:

> "7. Provision of policy that no officer, agent, or representative could waive any provision of condition, unless waiver was in writing attached to policy, did not preclude company's retention of proofs of loss for seven weeks from operating as waiver of defense that proper proofs were not furnished."

This case is referred to by counsel, and particularly do they refer to that part of the opinion at page 802 where the Court says:

> "It is insisted by counsel for defendant that there could be no waiver of the failure to furnish proper proofs of loss unless such waiver was indorsed upon the policy, since it was provided in the policy that no officer, agent, or rep-

resentative of the company should have power to waive any provision or condition unless such waiver was in writing and attached to the policy. The case of Scottish Union, etc., Ins. Co. *v.* Encampment Smelting Co., 166 F. 231 (C. C. A. 8), is cited and relied upon as holding such a provision in the policy valid and applicable to proofs of loss, and as holding further that where such provision had not been complied with suit on the policy could not be maintained.

"Though the ruling in that case is contrary to the rulings in several of the other circuits, yet we are not disposed to question its correctness at this time, inasmuch as we think it does not in any event control the case at bar. Neither in that case, nor in any of the cases cited by defendant on the same point, had there been retention of proofs of loss by the insurance company for an unreasonable length of time; in fact, no proofs of loss had been furnished within the specified time. In the case at bar proofs of loss had been furnished within the required time. Conceding, but without deciding, that they were defective, yet the company could not retain them for an unreasonable length of time and then return them with a denial of all liability without waiving the defects, if such existed; and so the authorities hold."

In the case of People's Bank of Greenville *v.* Aetna Ins. Co., 74 Fed. 507 (4th Cir.), the Court held:

"4. The making of a thorough investigation by the insurer on its own account, before receiving the proofs of loss, is no evidence of a waiver of the requirements of the policy in respect to proofs."

One of the authorities relied upon by counsel is that of Continental Ins. Co. *v.* Fortner, 25 Fed. (2d) 398 (6th Cir.), where it was held:

> "7. If insurer in terms denies liability before lapse of 60-day period for furnishing proofs of loss, it will be precluded from setting up as defense alleged failure to file such proofs within 60 days.
>
> "8. In action on fire insurance policy for destruction of dwelling by fire, evidence held to sustain finding that adjuster represented insurer, and that his statements and conduct constituted a waiver by insurer of timely proof of loss.
>
> "10. The fact that the insurer denies liability and refuses to pay on the ground of lack of contract, or lack of liability is itself a waiver of condition requiring proofs of loss."

There was never a denial of liability in the instant case, nor is a denial of liability alleged.

Another case relied upon by counsel is that of New York Underwriters Fire Insurance Co. *v.* Malham & Co., decided by Judge Kenyon of the Circuit Court of Appeals for the Eighth Circuit, 25 Fed. (2d) 415. That part of the opinion relied upon is found at page 432 as follows:

> "* * * The court probably would have been justified in finding that the proofs of loss were waived by the statements of Overstreet that all the companies would pay was the $5,500, as it seems to be the Arkansas doctrine that, where an insurance adjuster makes an offer of settlement and states that he proposes to stand on

> the offer so made, the furnishing of proof of loss is waived. Greenwich Ins. Co. *v.* State, 74 Ark. 72, 84 S. W. 1025; Security Mutual Ins. Co. *v.* Woodson, 79 Ark. 266, 95 S. W. 481, 116 Am. St. Rep. 75."

However, the court in that case was construing Section 6148 of the Arkansas statute which is set out at page 421 of the opinion and is as follows:

> "Sec. 6148. Substantial compliance with Conditions. In all actions against any fire insurance company, individual or corporation, for any claim accruing or arising upon or growing out of any policy upon personal property issued by any such company, individual or corporation, proof of a substantial compliance with the terms, conditions and warranties of such policy, upon the part of the assured, or party, individual, person or corporation to whom it may have been issued, or their assigns, shall be deemed sufficient, and entitle the plaintiff to recover in any such action. Act March 29, 1899, p. 142."

And the Circuit Court of Appeals in that case was following the construction placed upon that statute by the decisions of the State of Arkansas.

In this case, decided by Judge Kenyon, proof of loss were actually filed within 60 days from date of loss.

Another case relied upon by counsel is that of Firemen's Ins. Co. *v.* Brooks (6th Cir.), 32 Fed. (2d) 451, the Court held:

> "2. In action on fire policy, issue whether insurer waived requirement of policy for furnishing proofs of loss within 60 days was properly submitted to jury under evidence that ad-

> juster was immediately sent to premises, procured the material information, and stated proofs of loss need not be furnished."

Another case relied upon by counsel is that of Alliance Ins. Co. *v.* Enders (9th Cir.), 293 Fed. 485, in which the Court held:

> "4. Furnishing proofs of loss within the period stipulated in the policy is a condition precedent to recovery; but this requirement may be waived, or insurers may estop themselves from interposing that defense, by lulling insured into the belief that formal proofs will not be required."

The case of Globe & Rutgers Ins. Co. *v.* Prairie Oil & Gas Co., 248 Fed. 452 (9th Cir.), involves the question of sufficiency of proofs of loss. The proofs, however, were furnished.

The case of Lynchburg Cotton Mill Co. *v.* Travelers Ins. Co. (4th Cir.), 149 Fed. 954, involved a 30-day limitation clause, and because the company negotiated for a settlement for a period of ninety days after the 30-day limitation had expired, the Court held that the limitation was waived, and that the assured had thirty days after the negotiations ceased in which to start his action.

The case of Fellman *v.* Royal Ins. Co. (5th Cir.), 184 Fed. 577, dealt with the question of limitation on bringing of action, and held that the shortening of the time was a harsh condition and could be waived.

In the case of Fire Ass'n of Philadelphia *v.* Nime (5th Cir.), 9 Fed. (2d) 28, the Court held:

> "Provision of Texas standard fire policy that policy shall be void if insured carries more than $20,000 concurrent insurance is effective, unless change or waiver is written on or attached to policy as required therein, and parol proof of local agent's change or waiver thereof was inadmissible."

In view of the foregoing authorities, we insist that the question as to whether or not the condition is to be performed before or after the loss is immaterial; that the contract of insurance is the entire agreement between the parties, and that none of the terms, provisions or conditions of the fire insurance policy can be waived unless that waiver is in writing; that the conflict in the decisions of the Circuit Court of Appeals of the United States is a conflict between the Eighth and Fifth Circuit Courts of Appeals on the one hand and the Sixth and Ninth Circuit Courts of Appeals on the other hand and that the Tenth Circuit in the instant case adopted the rule of the Sixth and Ninth Circuit Courts of Appeals and that its decisions are in conflict with the decisions of the Supreme Court of the United States on the question of waiver. We contend that it cannot be said that certain provisions of the contract may be orally waived, when the contract provides that they can only be waived in writing, and that other provisions and requirements of the policy contract cannot be waived unless in writing, it being our contention that the contract is the entire agreement, and that none of the terms, provisions or conditions of the policy can be waived unless such waiver be in writing.

The construction of a fire insurance policy by the

State Court, even though the form of policy is prescribed by statute, is a construction of a contract and not a construction of a statute.

We desire to submit the following authorities on this question.

In Continental Insurance Co. *v.* Titcomb, 2 Fed. (2d) 833, the Circuit Court of Appeals for the Eighth Circuit, in the second syllabus, holds:

> "2. Fire policy, with appraisement provision, is a voluntary contract of parties, though form is prescribed by statute."

In the body of the opinion the Court says:

> "It is also true that the policy with the appraisement provision is a contract voluntarily made by the parties, notwithstanding the form is prescribed by statute. Phoenix Co. *v.* Everfresh Co. (C. C. A.) 294 Fed 51; Kollitz *v.* Insurance Co., 92 Minn. 234, 99 N. W. 892; Dunton *v.* Westchester Ins. Co. 104 Me. 372, 71 A. 1037, 20 L. R. A. (N. S.) 1058; Ebner *v.* Ohio State Ins. Co., 69 Ind. App. 32, 121 N. E. 315."

In the case of Chun Ngit Ngan *v.* Prudential Ins. Co. 9 Fed (2nd) 340, the Circuit Court of Appeals for the Ninth Circuit, in the third syllabus, holds:

> "3. Incontestable clause of life policy, though prescribed by statute of Territory of Hawaii (Rev. St. 1925, Sec. 3464, subd. 3), derives its force from consent of parties and not from statute, and construction thereof by territorial Supreme Court is not binding on the Circuit Court of Appeals."

In the body of the opinion the Court says:

> "The statutes of the territory of Hawaii provide that the standard policy shall contain a provision that the policy shall be incontestable not later than two years from its date, except for non-payment of premiums. Revised Stats. 1925, Sec. 3464 (3). And it is now contended that by reason of this provision the decision of the Supreme Court of the territory was based upon a local statute, and that the construction given that statute by the local court should be accepted by this Court. With this contention we are unable to agree. The action was based on a contract, not on a statute, and the contract derives its force and efficacy from the consent of the parties, not from any statute of the territory. As said by the Court in Duton *v.* Westchester Fire Ins. Co., 104 Me. 372, 71A 1037, 20 L. R. A. (N. S.) 1058: "But the Maine standard policy, though its form is prescribed by statute, is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties."

In Abner *v.* Ohio State Life Ins. Co., 69 Ind. App. 32, 121 N. E. 315, 319; the Court said:

> "The stipulation here, while prescribed by statute, derives its force from the consent of the parties to it as a part of contract; hence it should be construed as a contract, rather than as a statutory provision; its origin, however, being kept in view."

In Cooley's Briefs on the law of Insurance, Vol 1. First Edition, at page 630, we find the rule to be,

> "The fact that a fire policy is a standard form prescribed by statute does not alter its status as a contract, which must be construed by the rules of construction usually applied to insurance contracts."

This text is supported by decisions from the state courts of Connecticut, Massachusetts, Michigan, Minnesota, New York, North Carolina and Wisconsin.

The Supreme Court of Oklahoma has passed upon this question in the case of Shawnee Mut. Fire Ins. Co., *v.* School Board of School Dist. No. 31, Grady County, 143 Pac. (Okla.) 194, and holds:

> "3. A policy of fire insurance in the standard form prescribed by chapter 38, Art. 2, Rev. L. 1910, is not to be treated as a legislative enactment after it has been accepted by the parties but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties."
>
> "4. The terms and provisions of the standard policy of fire insurance, the use of which is required by legislative enactment, are to be construed as employed in the sense in which they were used and interpreted by the courts before that form of policy was adopted."

In the body of the opinion the Court says (143 Pac., page 196):

> "(3-4). In the case of Wener et al., *v.* Pioneer Fire Ins. Co. 145 Pac.—(not yet officially reported), it is said:
>
> "A policy of fire insurance in the standard form prescribed by chapter 38, Art. 2, Rev. L.

> 1910, is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties. The terms and provisions of the standard policy of fire insurance, the use of which is required by legislative enactment, are to be considered as employed in the sense in which they were used and interpreted by the courts before that form of policy was adopted."

We therefore submit that the standard form of fire insurance policy prescribed by the Oklahoma statute, when accepted by the parties is a voluntary contract to be construed as such by the courts.

Waiver.

On the question of the waiver of the terms and provisions of a fire insurance policy, we think that the rule has been universally established and that it is a well-settled principle of law in the Federal Courts that where a policy or contract of insurance contains a standard provision with reference to a waiver being in writing as does the policy in the case at bar, oral evidence cannot be introduced to establish a waiver, and that there can be no waiver of any of those conditions or provisions, except such waiver be in writing, signed by the defendant or its duly authorized agent, and attached to the policy. This principle of law, we think, is amply supported by the following authority:

> Northern Assur. Co. *v.* Grand View Bldg. Ass'n, 183 U. S. 308, 46 L. Ed. 212;

Lumber Underwriters of New York *v.* Rife, 237 U. S. 605, 59 L. Ed. 1140;

Scottish Union & Natl. Ins. Co. *v.* Encampment Smelting Co., 166 Fed. 231;

Rife et al. *v.* Lumber Underwriters, 234 Fed. 32;

St. Paul Fire & Marine Ins. Co. *v.* Penman, 151 Fed. 961;

Connecticut Fire Ins. Co. *v.* Buchanan, 141 Fed. 877;

Atlas Reduction Co. *v.* New Zealand Ins. Co., 138 Fed. 497;

New York Life Ins. Co. *v.* Fletcher, 117 U. S. 519, 29 L. Ed. 934;

Imperial Assurance Co. *v.* County of Coos, 151 U. S. 452, 38 L. Ed. 231;

Fidelity Union Fire *v.* Kelleher, 13 Fed. (2d) 745;

Boston Ins. Co. *v.* Hudson, 11 Fed. (2d) 961;

Hartford Fire Ins. Co. *v.* Nance, 12 Fed. (2d) 575;

Hartford Fire Ins. Co. *v.* Jones, 15 Fed. (2d) 1;

Forkner *v.* Twin City Fire Ins. Co., 19 Fed. (2d) 419;

Fire Ass'n of Philadelphia *v.* Nime, 9 Fed. (2d) 28;

Christian & Brough Co. *v.* St. Paul Fire & Marine Ins. Co., 5 Fed. (2d) 489;

Missouri-Pacific Ry. Co. *v.* Western Assurance Co., 129 Fed. 610.

We conclude and respectfully submit that the Federal Court is bound by the construction placed upon

Statutes of Oklahoma by the Supreme Court of Oklahoma, and that as the Supreme Court has construed the statute on interest, Section 5972 Compiled Oklahoma Statutes, 1921, and has held that the interest can be recovered only from the date of judgment, that the Court erred in entering judgment for interest in this case from a date approximating a time 60 days after proofs of loss should have been filed, and that such action on the part of the trial court and the Circuit Court of Appeals for the Tenth Circuit is error.

We further submit that inasmuch as there is a conflict in the decisions of the Circuit Courts of Appeals on the question of an oral waiver of the terms, provisions and conditions of a fire insurance policy, by reason of which this Court granted the writs of certiorari, the decision of the Circuit Court of Appeals for the Eighth Circuit in Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., *supra*, is in accord with the decisions of this Court in the two leading insurance decisions hereinbefore cited, Northern Assurance Co. *v.* Grand View Bldg. Ass'n, *supra*, and Imperial Assurance Co. *v.* County of Coos, *supra*, that said decision correctly and properly interprets the law pertaining to contracts, and to contracts of insurance, and that the great weight of Federal authority is to the effect that the terms and provisions of the policy requiring proofs of loss to be filed within sixty days unless the time is extended in writing by the insurer, is a condition precedent to the filing of a suit and cannot be waived except such waiver be in writing, as required by the policy contract.

And we further submit that the contention of respondent that because the filing of a proof of loss is a condition to be performed by the assured after the loss, it may be waived orally, is without foundation or reason, and that there is nothing in the policy or policies whereby this standard provision with reference to waiver is limited to conditions and warranties previous to a loss, but that the standard provision with reference to waiver applies with the same force and effect to conditions to be performed after a loss as to conditions before a loss, and that to hold otherwise would be to make a different contract than the parties themselves made, and would in effect be a judicial amendment to the contract which the parties entered into.

Respectfully submitted

F. A. RITTENHOUSE, and
H. C. THURMAN,
Counsel for Petitioners.

January, 1931.

FILE COPY

AUG 1[illegible]

CHARLES [illegible]

In the Supreme Court of the United States

October Term, 1930

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent. — NO. 278

ROYAL INSURANCE COMPANY, LTD., Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent. — NO. 279

NATIONAL FIRE INSURANCE COMPANY, Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent. — NO. 280

FIRE ASSOCIATION OF PHILADELPHIA, Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent. — NO. 281

RESPONDENT'S PROTEST AND BRIEF AGAINST THE ISSUANCE OF WRITS OF CERTIORARI

R. M. Rainey,
Streeter B. Flynn,
Frank G. Anderson,
Chester H. Lowry,
Counsel for Respondent.

Rainey, Flynn, Green & Anderson, of Counsel.

Unterbach Typesetting Co.

INDEX

Interest 2
Waiver of Proof of Loss 9

Cases Cited

Page
Aetna Ins. Co v. Solomon, 172 Ark. 169, 287 S. W. 1000 8
Aetna Life Ins. Co. v. Moore, 231 U. S. 543 10
Alliance Ins. Co. v. Enders, 293 Fed. 485 12
American Eagle Fire Ins. Co. v. Lively, 286 Pac. 797 6
American Century Ins. Co. v. Donlon, 16 Colo. A. 416, 66 Pac. 249 13
American Ins. Co. v. Ott, 97 Okla. 125, 223 Pac. 121 14
Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497 10
Atlas Assurance Co. v. Leonard, 108 Okla. 150, 234 Pac. 771 14
Baker v. Northern Assurance Co., 214 Mich. 540, 183 N. W. 61 8
Bank of South Jacksonville v. Hartford Fire Ins. Co., 1 Fed. (2d) 43 11
Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 8 Am. & Eng 4
Berry v. Virginia State Ins. Co., Ann. Cases 298, 83 S. C. 13, 64 S. E. 859 .. 8
City of Chickasha v. Hollingsworth, 56 Okla. 341, 155 Pac. 859 2
City of Oklahoma City v. Hoke, 75 Okla. 211, 182 Pac. 692 3
City of Tulsa v. Copp, 127 Okla. 128, 260 Pac. 16 5
Clark v. Milwaukee Mechanic's Ins. Co., 105 Kan. 728, 185 Pac. 1056 13
Columbia Real Estate & Trust Co. v. Royal Exchange Assurance, 132 S. C. 427, 128 S. E. 865 8
Continental Ins. Co. v. Nabors, 6 S. W. (2d) 151 8
Continental Ins. Co. v. Fortner, 25 Fed. (2d) 398 11
Cottingham v. National Mutual Church Ins. Co., 209 Ill. App. 557, 124 N. E. 822 8
Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100 8
Fellman v. Royal Ins. Co., 184 Fed. 577 12
Fidelity Phoenix Fire Ins. Co. v. Queen City Bus & Transfer Co., 3 Fed. (2d) 784 10
Fidelity Union Fire Ins. Co. v. Kelleher, 13 Fed. (2d) 745 10
Fire Association of Philadelphia v. Nime, 9 Fed. (2d) 28 10
Firemen's Fund Ins. Co. v. Haley, 129 Miss 525, 92 So. 635 8
Firemen's Ins. Co. v. Brooks, 32 Fed. (2d) 451 12
German Ins. Co. v. Gray, 43 Kan. 497, 23 Pac. 637 13
Gloge & Rutgers Ins. Co. v. Prairie Oil & Gas Co., 248 Fed. 452 12
Great American Ins. Co. v. Herrington, 127 Okla. 13, 259 Pac. 582 14

	Page
Hartford Fire Ins. Co. v. Bernard, 99 Okla. 44, 221 Pac. 1011	4
Hartford Fire Ins. Co. v. Nance, 12 Fed. (2d) 575	10
Hartford Fire Ins. Co. v. Empire Coal Co., 30 Fed. (2d) 794	12
Hartford Fire Ins. Co. v. Hammond, 41 Colo. 323, 92 Pac. 686	13
Hartford Fire Ins. Co. v. Sullivan, 74 Okla. 241, 179 Pac. 24	14
Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. A. 264, 53 Pac. 242	13
Home Ins. Co. v. Bennett, 9 S. W. (2d) 432	8
Home Ins. Co. v. Hightower, 22 Fed. (2d) 882	12
Huchberger v. Home Fire Ins. Co., 12 Fed. Cases 793	8
Imperial Fire Ins. Co. v. County of Coos, 151 U. S. 452	9
Jackson v. Fidelity & Casualty Ins. Co., 75 Fed. 359	12
Kahn v. Traders Ins. Co., 4 Wyo. 419, 34 Pac. 1059	13
Laycock v. Parker, 103 Wis. 161, 79 N. W. 327	8
Loftis v. Pacific Mutual Ins. Co., 38 Utah 532, 114 Pac. 134	14
Lumber Underwriters v. Rife, 237 U. S. 605	10
Lynchburg Cotton Mill Co. v. Travelers Ins. Co., 149 Fed. 954	12
Midland Valley Ry. Co. v. Price, 127 Okla. 106, 260 Pac. 26	4
Missouri Pacific Ry. Co. v. Western Assurance Co., 129 Fed. 610	10
New York Underwriters Fire Ins. Co. v. Malkam & Co., 25 Fed. (2d) 415	12
Northern Assurance Co. v. Grandview Building Association, 183 U. S. 308	10
Olson v. Herman Farmers Mutual Ins. Co., 187 Wis. 15, 203 N. W. 743	8
Osborne v. Phenix Ins. Co., 23 Utah 428, 64 Pac. 1103	14
Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 Atl. 484	4
Penman v. St. Paul Fire & Marine Ins. Co., 216 U. S. 311	10
Randall v. American Fire Ins. Co., 25 Pac. 953	4
Reed v. Continental Ins. Co., 65 Atl. 569	8
Riddlebarger v. Hartford Fire Ins. Co., 74 U. S. 386	9
Ring v. Phoenix Assurance Co., 100 Kan. 341, 164 Pac. 303	13
Robinson v. Palatine Ins. Co., 11 N. M. 162, 66 Pac. 535	14
Ross v. Phenix Inc. Co., 84 Kan. 572, 114 Pac. 1054	13
Royal Ins. Co. v. Martin, 192 U. S. 149	12
San Francisco Savings Union v. Western Assurance Co., 157 Fed. 695	11
Scottish Union and National Ins. Co. v. Encampment Smelting Co., 166 Fed. 231	10
Southern Pacific Co. v. Arnett, 126 Fed. 75	8
Speed v. McMurray, 73 Okla. 325, 176 Pac. 506	3
Standard Oil Co. v. United States, 267 U. S. 26	7
State Mutual Ins. Co. v. Green, 62 Okla. 214, 166 Pac. 105	14
Steel v. Phoenix Ins. Co., 51 Fed. 715	12
St. Paul Fire & Marine Ins. Co. v. Robinson, 72 Okla. 269, 180 Pac. 702	3
The Scotland, 105 U. S. 24 at 35	8
Thompson v. Phoenix Ins. Co., 136 U. S. 287	12
Twin City Fire Ins. Co. v. Stockmen's National Bank, 261 Fed. 470	11
West v. Norwick Union Fire Ins. Co., 10 Utah 442, 37 Pac. 685	14
Western National Ins. Co. v. Marsh, 34 Okla. 414, 125 Pac. 1094	14

Statutes Cited

	Page
Compiled Oklahoma Statutes 1921:	
Section 5972	7
Section 5973	5
Section 5976	7
Section 5977	7
Section 5996	5

In the Supreme Court of the United States

October Term, 1930

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent.

NO. 278

ROYAL INSURANCE COMPANY, LTD., Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent.

NO. 279

NATIONAL FIRE INSURANCE COMPANY, Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent.

NO. 280

FIRE ASSOCIATION OF PHILADELPHIA, Petitioner,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, Respondent.

NO. 281

RESPONDENT'S PROTEST AND BRIEF AGAINST THE ISSUANCE OF WRITS OF CERTIORARI

Petitioners seek the issuance of writs of certiorari upon two grounds, namely:

1. Because interest was allowed respondent upon the verdicts of the jury from one hundred and twenty days after the loss up to the date of said verdicts.
2. Because the court held the petitions stated facts sufficient to constitute a waiver of written, verified proof of loss.

We will discuss these grounds in the order named.

I.

Was respondent entitled to interest upon the verdicts of the jury from one hundred and twenty days after the loss up to the date of said verdicts?

We respectfully submit that it would have been impossible for the Circuit Court of Appeals to have decided this question either way without being in conflict with some of the decisions of the Supreme Court of Oklahoma. There are decisions of the state court sustaining petitioners' position, and there are decisions of the same court amply sustaining the holding herein of the Circuit Court. The Circuit Court, therefore, had to exercise its judgment as to what was the law upon the subject, and we respectfully suggest that its holding is correct, just, and is sustained by the best reasoned decisions of the Oklahoma Court.

The earliest decision of the Supreme Court of Oklahoma upon which petitioners rely, is *City of Chickasha* v. *Hollingsworth,* 56 Okla. 341, 155 Pac. 859. That case did not involve a recovery upon an insurance policy, but was an

action for the recovery of unliquidated damages in the true sense of the word. The Court applied Section 5972, Compiled Oklahoma Statutes 1921 (quoted in petitioners' brief, page 10), which provides when interest may be recovered where the damages are unliquidated.

The next decision (in point of time) was *St. Paul Fire & Marine Ins. Co.* v. *Robinson*, 72 Okla. 269, 180 Pac. 702, cited by petitioners. That involved a recovery under a policy insuring growing crops against loss or injury by hail. The Court followed *City of Chickasha* v. *Hollingsworth, supra*, and applied the same rule and the same statute. An examination of that case discloses no other authority was considered.

Petitioners also rely upon *Speed* v. *McMurray*, 73 Okla. 325, 176 Pac. 506. That was an action to recover damages on account of fraud in exchange of real estate. The Court bases its ruling upon *City of Chickasha* v. *Hollingsworth, supra*, and no other authority.

Perhaps the next case decided by the Oklahoma Court involving recovery of interest upon damages, is *City of Oklahoma City* v. *Hoke*, 75 Okla. 211, 182 Pac. 692. That case involved damages to growing crops, caused by flood waters. The Court held the plaintiff was entitled to interest upon the damages found from the date of the loss. The Court says *City of Chickasha* v. *Hollingsworth, supra*, is

distinguishable, but does not say how. Petitioners do not cite this case.

The next case decided by the Oklahoma Court involving this question, is *Hartford Fire Ins. Co.* v. *Bernard,* 99 Okla. 44, 221 Pac. 1011. That involved recovery upon a fire insurance policy for the loss of an automobile destroyed by fire. The Court held the plaintiff was entitled to interest upon the amount of the loss from approximately sixty days after proof of loss was furnished. The Court does not refer to *City of Chickasha* v. *Hollingsworth, supra,* nor *St. Paul Fire & Marine Ins. Co.* v. *Robinson, supra.* It does say the action was to recover upon a written contract, which provided the amount plaintiff was entitled to recover, in the event of the loss of the property, based upon the market value of the property insured. The Court cites with approval *Randall* v. *American Fire Ins. Co.,* 25 Pac. 953 (Mont.); *Bernhard* v. *Rochester German Ins. Co.,* 79 Conn. 388, 8 Am. & Eng. Ann. Cases 298; *Palatine Ins. Co.* v. *O'Brien,* 107 Md. 341, 68 Atl. 484. *Bernard* v. *Rochester German Ins. Co., supra,* cited with approval by the Supreme Court of Oklahoma, is also cited with approval by the Circuit Court of Appeals in the case at bar.

Petitioners cite *Midland Valley Ry. Co.* v. *Price,* 127 Okla. 106, 260 Pac. 26, decided October 11, 1927. In that case the Court held plaintiff was entitled to interest on his recovery for injuries to a shipment of cattle. On the same

date an opinion was filed in *City of Tulsa* v. *Copp*, 127 Okla. 128, 260 Pac. 16. In the latter case the Court held plaintiff was entitled to interest on the amount recovered as damages to a building. Petitioners do not cite this case. The Court there distinguishes *City of Chickasha* v. *Hollingsworth, supra*, and reviews Secs. 5972, 5973, 5996, Compiled Oklahoma Statutes 1921. The Court further says the test is not whether the damages are unliquidated, or otherwise, but whether the injury and consequent damages are complete and not continuing, and can, or must be ascertained as of a particular time in accordance with fixed rules of evidence and known standards of value. The Court says that under present day methods of engineering, construction and standards of value and costs, it would be as possible to ascertain the approximate cost of the construction or repair of a building, as it would be to ascertain the value of personal property having a fixed or market value.

The petitions allege (Tr. 15) that the insurance companies by their agents and adjusters represented to respondent, after the loss, that the furniture and fixtures destroyed were of a value far in excess of the insurance thereon. Also, that said insurance companies stated they knew approximately to the dollar what it would cost to replace the building.

The attention of the Circuit Court of Appeals was di-

rected to all of the foregoing cases, both in the briefs and in the oral argument which was had on February 3, 1930.

The opinion by the Circuit Court of Appeals was filed April 18, 1930. On April 8, 1930, ten days before the opinion in this cause, the Supreme Court of Oklahoma again decided the question and held interest was not recoverable prior to judgment. *American Eagle Fire Ins. Co.* v. *Lively*, 286 Pac. 797 (not yet reported in Oklahoma Reports). The opinion refers to *St. Paul Fire & Marine Ins. Co.* v. *Robinson, supra*, but does not mention *Hartford Ins. Co.* v. *Bernard, supra; City of Oklahoma City* v. *Hoke, supra*, and *City of Tulsa* v. *Copp, supra*, which are to the contrary.

It will be observed the decisions of the Oklahoma Supreme Court are in a rather hopeless conflict. The reason may be that ascribed by the Supreme Court of Wisconsin in *Laycock* v. *Parker*, 103 Wis. 161, 79 N. W. 327, in which it is said:

> "The question of interest is one much more often passed upon than carefully considered by the courts. It is usually presented only incidentally to much more important issues, and often decided one way or the other at the close of exhaustive investigation of the other questions, and with the perhaps unconscious feeling that it is not of sufficient magnitude to justify further serious labor."

In *St. Paul Fire & Marine Ins. Co.* v. *Robinson, supra*, the interest involved was less than $5.00, while in the case at bar interest involves more than $10,000.00.

Section 5972, Compiled Oklahoma Statutes 1921 (quoted by petitioners) is not a limitation upon the allowance of interest upon damages, but is an express command that interest be allowed under certain conditions. It is our contention that said section of the statutes is not applicable to the situation here presented. This action is not for damages in the ordinary meaning of that word. It is an action to recover money due upon contract. Therefore, it is our contention Sections 5976 and 5977, Compiled Oklahoma Statutes 1921, more nearly apply. These sections read:

> "5976. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin.
>
> "5977. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

It would seem the Circuit Court of Appeals was of the opinion Section 5977 was more nearly applicable.

As to authorities from other jurisdictions in addition to those cited by the Circuit Court of Appeals, see: *Standard Oil Co.* v. *United States,* 267 U. S. 26; *The Scotland,*

105 U. S. 24 at 35; *Southern Pacific Co.* v. *Arnett,* 126 Fed. 75 (8 C. C. A.); *Laycock* v. *Parker,* 103 Wis. 161, 79 N. W. 327; *Cox* v. *McLaughlin,* 76 Cal. 60, 18 Pac. 100; *Huchberger* v. *Home Fire Ins. Co.,* 12 Fed. Cases 793, Case No. 6821; *Fireman's Fund Ins. Co.* v. *Haley,* 129 Miss. 525, 92 So. 635; *Cottingham* v. *National Mutual Church Ins. Co.,* 209 Ill. App. 557, 124 N. E. 822; *Columbia Real Estate & Trust Co.* v. *Royal Exchange Assurance,* 132 S. C. 427, 128 S. E. 865; *Berry* v. *Virginia State Ins. Co.,* 83 S. C. 13, 64 S. E. 859; *Olson* v. *Herman Farmers Mutual Ins. Co.,* 187 Wis. 15, 203 N. W. 743; *Aetna Ins. Co.* v. *Solomon,* 172 Ark. 169, 287 S W. 1000; *Continental Ins. Co.* v. *Nabors* (Texas Civ. App.), 6 S. W. (2d) 151; *Home Ins. Co.* v. *Bennett* (Texas Civ. App.), 9 S. W. (2d) 432; *Baker* v. *Northern Assurance Co.,* 214 Mich. 540, 183 N. W. 61, and *Reed* v. *Continental Ins. Co.* (Del.), 65 Atl. 569. Not only is the decision in this case in accord with the great weight of authority, but it is not in conflict with any established rule in Oklahoma. The only conflict is between the decisions of the Oklahoma Supreme Court. Whichever way the Circuit Court of Appeals might have decided this question, it would have been in accord with and supported by the decisions of that Court. Therefore, we respectfully submit this Honorable Court should deny the issuance of the writs upon this question.

II.

Did the Court err in holding the petitions stated facts sufficient to constitute a waiver of written, verified proof of loss?

The Circuit Court of Appeals struck the bill of exceptions from the record (Tr. 400), and the cause was presented to that Court upon the transcript only. Therefore, this question must be determined by whether or not the allegations of respondent's amended petitions are sufficient to constitute a waiver of the furnishing of written, verified proof of loss, in the strict manner provided in the policies. We will not attempt to set out those allegations. They can be found in the transcript at pages 11, 46, 68 and 90, and are summarized in the Circuit Court of Appeals opinion T. 404 *et seq.*)

We respectfully contend there is no conflict on this question between the decision of the Circuit Court of Appeals and the opinions of this Honorable Court, and there is not sufficient conflict, if any, between said decision and the opinions of any of the other Circuit Courts of Appeals to warrant the issuance of said writs of certiorari. In fact all of the Circuit Courts of Appeals are now substantially in accord on this question.

Petitioners contend the decision is in conflict with *Riddlebarger* v. *Hartford Fire Ins. Co.*, 74 U. S. 386; *Imperial Fire Ins.Co.* v. *County of Coos*, 151 U. S. 452; *North-*

ern Assurance Co. v. *Grand View Building Ass'n.*, 183 U. S. 308; *Lumber Underwriters* v. *Rife*, 237 U. S. 605; *Penman* v. *St. Paul Fire & Marine Ins. Co.*, 216 U. S. 311, and *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543. None of these cases involved a waiver of proof of loss. They all involved a violation of covenants to be kept by the insured prior to a loss, except the latter case, which involved an untrue representation and warranty made by the insured in obtaining a life insurance policy, and the further exception that *Riddlebarger* v. *Hartford Fire Ins. Co., supra*, involved a question of limitations.

Petitioners also contend the decision is in conflict with the following decisions by the Circuit Courts of Appeals: *Atlas Reduction Co.* v. *New Zealand Ins. Co.*, 138 Fed. 497 (8 C. C. A.); *Fidelity Phoenix Fire Ins. Co.* v. *Queen City Bus & Transfer Co.*, 3 Fed. (2d) 784 (4 C. C. A.); *Fidelity Union Fire Ins. Co.* v. *Kelleher*, 13 Fed. (2d) 745 (9 C. C. A.); *Fire Association of Philadelphia* v. *Nime*, 9 Fed. (2d) 28 (5 C. C. A.); *Hartford Fire Ins. Co.* v. *Nance*, 12 Fed. (2d) 575 (6 C. C. A.), and *Scottish Union & National Ins. Co.* v. *Encampment Smelting Co.*, 166 Fed. 231 (8 C. C. A.). None of these cases involve waiver of proof of loss, except *Scottish Union & National Ins. Co.* v. *Encampment Smelting Co., supra*, by the Eight Circuit.

Missouri Pacific Ry. Co. v. *Western Assurance Co.*, 129

Fed. 610; *San Francisco Savings Union* v. *Western Assurance*, 157 Fed. 695, and *Bank of South Jacksonville* v. *Hartford Fire Ins. Co.*, 1 Fed. (2d) 43; cited by petitioners, are all district court cases. Only the first case involved waiver of proof of loss. *North British & Mercantile Ins. Co.* v. *Lamar Harris*, 34 Fed. (2d) 94, cited by petitioners, we are unable to find.

An examination of all the cases cited by petitioners disclose no case by this court in conflict with the decision in the case at bar, and none by the Circuit Courts of Appeals, except *Scottish Union & National Ins. Co.* v. *Encampment Smelting Co.*, *supra*, by the Eight Circuit. The court there based its decision largely upon *Northern Assurance Co.* v. *Grand View Building Ass'n.*, *supra*, by this court. In our judgment, it misinterpreted that decision. This court was not deciding a question of waiver of proof of loss, but the violation of a provision against additional insurance; a covenant to be kept and performed before a loss; a condition of the insurance; not a condition subsequent to facilitate adjustment of the loss, but a condition precedent to liability. For these reasons *Northern Assurance Co.* v. *Grand View Building Ass'n.*, *supra*, and *Lumber Underwriters* v. *Rife*, *supra*, were distinguished in *Twin City Ins. Co.* v. *Stockmen's National Bank*, 261 Fed. 470 (9 C. C. A.), and *Continental Ins. Co.* v. *Fortner*, 25 Fed. (2d) 398 (6 C. C. A.).

Other cases supporting the rule that proof of loss may be waived by conduct and oral statements are: *Jackson* v. *Fidelity & Casualty Ins. Co.*, 75 Fed. 359 (5 C. C. A.); *Globe & Rutger's Ins. Co.* v. *Prairie Oil & Gas Co.*, 248 Fed. 452 (2 C. C. A.); *Alliance Ins. Co.* v. *Enders*, 293 Fed. 485 (9 C. C. A.); Home *Ins. Co.* v. *Hightower*, 22 Fed. (2d) 882 (5 C. C. A.). Certiorari denied in the later case, 276 U. S. 634. *Firemen's Ins. Co.* v. *Brooks*, 32 Fed. (2d) 451 (6 C. C. A.).

In two late cases the Eighth Circuit has expressed doubt as to the correctness of its decision in the *Scottish Union & National Ins. Co.* v. *Encampment Smelting Co., supra; New York Underwriters Fire Ins. Co.* v. *Malhan & Co.*, 25 Fed. (2d) 415, and *Hartford Fire Ins. Co.* v. *Empire Coal Co.*, 30 Fed. (2d) 794.

In line with the authorities that provisions of a policy to be performed after a loss can be waived by conduct, this court, in *Thompson* v. *Phoenix Ins. Co.*, 136 U. S. 287, held that a provision in the policy limiting the time within which an action could be instituted was waived. Other cases holding that limitation provisions of a policy may be waived are: *Steel* v. *Phoenix Ins. Co.*, 51 Fed. 715 (9 C. C. A.); *Lynchburg Cotton Mill Co.* v. *Travelers Ins. Co.*, 149 Fed. 954 (4 C. C. A.); *Fellman* v. *Royal Ins. Co.*, 184 Fed. 577 (5 C. C. A.), and *Jackson* v. *Fidelity & Casualty Co.*, 75 Fed. 359 (5 C. C. A.). This court in *Royal Ins. Co.* v. *Martin*,

192 U. S. 149, at 162 held that proofs of loss were waived where the insurer denied liability or refused to pay in any event. This opinion is squarely against the contention of petitioners that proof of loss cannot be waived, except by endorsement in writing upon the policy. It would seem if it could be waived by one method of conduct, it could by another.

The opinion in the case at bar is in harmony with the decisions of the State courts of all the states embraced within the Tenth Circuit.

Kansas:

German Insurance Co. v. *Gray*, 43 Kan. 497, 23 Pac. 637.

Ross et al. v. *Phenix Ins. Co.*, 84 Kan. 572, 114 Pac. 1054.

Ring v. *Phoenix Assurance Co.*, 100 Kan. 341, 164 Pac. 303.

Clark v. *Milwaukee Mechanic's Ins. Co.*, 105 Kan. 728, 185 Pac. 1056.

Colorado:

Helvetia Swiss Fire Ins. Co. v. *Edward P. Allis Co.*, 11 Colo. A. 264, 53 Pac. 242.

American Century Ins. Co. v. *Donlon*, 16 Colo. A. 416, 66 Pac. 249.

Hartford Fire Ins. Co. v. *Hammond*, 41 Colo. 323, 92 Pac. 686.

Wyoming:

Kahn v. *Traders Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059.

New Mexico:

Robinson v. *Palatine Ins. Co.*, 11 N. M. 162, 66 Pac. 535.

Oklahoma:

Western National Ins. Co. v. *Marsh*, 34 Okla. 414, 125 Pac. 1094.

State Mutual Ins. Co. v. *Green*, 62 Okla. 214, 166 Pac. 105.

Hartford Fire Ins. Co. v. *Sullivan*, 74 Okla. 241, 179 Pac. 24.

American Ins. Co. v. *Ott*, 97 Okla. 125, 223 Pac. 121.

Atlas Assurance Co. v. *Leonard*, 108 Okla. 150, 234 Pac. 771.

Great American Ins. Co. v. *Herrington*, 127 Okla. 13, 259 Pac. 582.

Utah:

West v. *Norwich Union Fire Ins. Co.*, 10 Utah 442, 37 Pac. 685.

Osborne v. *Phenix Ins. Co.*, 23 Utah 428, 64 Pac. 1103.

Loftis v. *Pacific Mutual Ins. Co.*, 38 Utah 532, 114 Pac. 134.

Respondent's petitions not only alleged waiver of proof *of loss, but estoppel of petitioners to plead failure to furnish proofs in the strict manner provided in the policies* (T. 13 *et seq.*, T. 404 *et seq.*).

We respectfully submit the decision is in accord with

the great weight of authority on both questions raised, and the applications for writs of certiorari should be denied.

Respectfully submitted,

R. M. Rainey,
Streeter B. Flynn,
Frank G. Anderson,
Chester H. Lowry,
Counsel for Respondent.

Rainey, Flynn, Green
& Anderson, of Counsel.

FILE COPY

FILED
JAN 14 193
CHARLES ELMORE CRO
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, *Petitioner*,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*. — No. 278

ROYAL INSURANCE COMPANY, LTD., *Petitioner*,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*. — No. 279

NATIONAL FIRE INSURANCE COMPANY, *Petitioner*,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*. — No. 280

FIRE ASSOCIATION OF PHILADELPHIA, *Petitioner*,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*. — No. 281

BRIEF FOR RESPONDENT.

R. M. RAINEY,
STREETER B. FLYNN,
FRANK G. ANDERSON,
Counsel for Respondent.

CHESTER H. LOWRY,
RAINEY, FLYNN, GREEN & ANDERSON,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

FIRST PROPOSITION — Page

Interest 2

SECOND PROPOSITION

Waiver of Proof of Loss 11

CASES CITED.

Aetna Ins. Co. v. Solomon, 172 Ark. 169, 287 S. W. 1000 10

Alliance Ins. Co. v. Enders, 293 Fed. 485 17

American Eagle Fire Ins. Co. v. Lively, 142 Okla. 246, 286 Pac. 797 4

American Century Ins. Co. v. Donlon, 16 Colo. A. 416, 66 Pac. 249 18

American Ins. Co. v. Ott, 97 Okla. 125, 223 Pac. 121 18

Atlas Assurance Co. v. Leonard, 108 Okla. 150, 234 Pac. 771 18

Baker v. Northern Assurance Co., 214 Mich. 540, 183 N. W. 61 10

Bernard v. Rochester German Ins. Co., 79 Conn. 388, 8 Am. & Eng. 5

Berry v. Virginia State Ins. Co., Ann. Cases 298, 83 S. C. 13, 64 S. E. 859 10

Burgess v. Seligman, 107 U. S. 20 7

City of Chickasha v. Hollingsworth, 56 Okla. 341, 155 Pac. 859 4

City of Oklahoma City v. Hoke, 75 Okla. 211, 182 Pac. 692 5

City of Tulsa v. Copp, 127 Okla. 128, 260 Pac. 16. 5

Clark v. Milwaukee Mechanic's Ins. Co., 105 Kan. 728, 185 Pac. 1056 17

Columbia Real Estate & Trust Co. v. Royal Exchange Assurance, 132 S. C. 427, 128 S. E. 865.. 10

Continental Ins. Co. v. Nabors, 6 S. W. (2d) 151.. 10

Continental Ins. Co. v. Fortner, 25 Fed. (2d) 398. 15

Cottingham v. National Mutual Church Ins. Co., 209 Ill. App. 557, 124 N. E. 822 10

Page

Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100 10
Fellman v. Royal Ins. Co., 184 Fed. 577 16
Firemen's Fund Ins. Co. v. Haley, 129 Miss. 525, 92 So. 635 10
Firemen's Ins. Co. v. Brooks, 32 Fed. (2d) 451.. 17
German Ins. Co. v. Gray, 43 Kan. 497, 23 Pac. 637 17
Gloge & Rutgers Ins. Co. v. Prairie Oil & Gas Co., 248, 452 17
Great American Ins. Co. v. Herrington, 127 Okla. 13, 259 Pac. 582 18
Hartford Fire Ins. Co. v. Bernard, 99 Okla. 44, 221 Pac. 1011 4
Hartford Fire Ins. Co. v. Empire Coal Co., 30 Fed. (2d) 794 15
Hartford Fire Ins. Co. v. Hammond, 41 Colo. 323, 92 Pac. 686 18
Hartford Fire Ins. Co. v. Sullivan, 74 Okla. 241, 179 Pac. 24 18
Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. A. 264, 53 Pac. 242 18
Home Ins. Co. v. Bennett, 9 S. W. (2d) 432 10
Home Ins. Co. v. Hightower, 22 Fed. (2d) 882... 16
Huchberger v. Home Fire Ins. Co., 12 Fed. Cases 793 10
Imperial Fire Ins. Co. v. County of Coos, 151 U. S. 452 16
Jackson v. Fidelity & Casualty Ins. Co., 75 Fed. 359 17
Kahn v. Traders Ins. Co., 4 Wyo. 419, 34 Pac. 1059 18
Kuhn v. Fairmont Coal Co., 215 U. S. 349 7
Laycock v. Parker, 103 Wis. 161, 79 N. W. 327...8, 10
Loftis v. Pacific Mutual Ins. Co., 38 Utah 532, 114 Pac. 134 19
Lumber Underwriters v. Rife, 237 U. S. 605 15
Lynchburg Cotton Mill Co. v. Travelers Ins. Co., 149 Fed. 954 16
Midland Valley Ry. Co. v. Price, 127 Okla. 106, 260 Pac. 26 4

Page

Miller v. Robinson, 266 U. S. 243 8
Morley v. Lake Shore Ry. Co., 146 U. S. 162..... 4
New York Underwriters Fire Ins. Co. v. Malkam & Co., 25 Fed. (2d) 415 15
Northern Assurance Co. v. Grandview Building Association, 183 U. S. 308 15
Olson v. Herman Farmers Mutual Ins. Co., 187 Wis. 15, 203 N. W. 743 10
Osborne v. Phenix Ins. Co., 23 Utah 428, 64 Pac. 1103 19
Penman v. St. Paul Fire & Marine Ins. Co., 216 U. S. 311 16
Reed v. Continental Ins. Co., 65 Atl. 569 10
Ring v. Phoenix Assurance Co., 100 Kan. 341, 164 Pac. 303 17
Robinson v. Palatine Ins. Co., 11 N. M. 162, 66 Pac. 535 18
Ross v. Phenix Inc. Co., 84 Kan. 572, 114 Pac. 1054 17
Royal Ins. Co. v. Martin, 192 U. S. 149 16
Scottish Union and National Ins. Co. v. Encampment Smelting Co., 166 Fed. 231 15
Southern Pacific Co. v. Arnett, 126 Fed. 75 10
Speed v. McMurray, 73 Okla. 325, 176 Pac. 506.. 4
Standard Oil Co. v. United States, 267 U. S. 76.. 9
State Mutual Ins. Co. v. Green, 62 Okla. 214, 166 Pac. 105 18
Steel v. Phoenix Ins. Co., 51 Fed. 715 16
St. Paul Fire & Marine Ins. Co. v. Robinson, 72 Okla. 269, 180 Pac. 702 4
The Scotland, 105 U. S. 24 at 35 10
Thompson v. Phoenix Ins. Co., 136 U. S. 287 16
Twin City Fire Ins. Co. v. Stockmen's National Bank, 261 Fed. 470 15
Wade v. Travis County, 174 U. S. 499 7
West v. Norwick Union Fire Ins. Co., 10 Utah 442, 37 Pac. 685 18
Western National Ins. Co. v. Marsh, 34 Okla. 414, 125 Pac. 1094 18

STATUTES CITED.

	Page
Compiled Oklahoma Statutes 1921:	
Section 5972	5
Section 5977	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, *Petitioner*, *vs.* SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*.	No. 278
ROYAL INSURANCE COMPANY, LTD., *Petitioner*, *vs.* SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*.	No. 279
NATIONAL FIRE INSURANCE COMPANY, *Petitioner*, *vs.* SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*.	No. 280
FIRE ASSOCIATION OF PHILADELPHIA, *Petitioner*, *vs.* SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*.	No. 281

BRIEF FOR RESPONDENT.

There are four of these cases. The fundamental facts are the same in each; therefore, for convenience they have been briefed as one.

The cases are here on Writs of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

These actions are by Respondent to recover upon policies issued by petitioners insuring respondent's school building and the furniture and equipment therein against loss by fire.

Respondent recovered judgments in the United States District Court for the Western District of Oklahoma against each of the petitioners.

The Circuit Court of Appeals struck petitioner's Bill of Exceptions from the files for the reason it did not conform to the rules of the Court and considered the case upon the transcript of the record only.

The judgments were affirmed by the Circuit Court of Appeals.

Petitioners have raised two questions only which they have discussed in their brief under two propositions. Under the first they contend respondent was not entitled to interest prior to date of the judgments; under the second they contend respondent's amended petitions do not state a cause of action for the reason they show verified proofs of loss were not furnished in the manner provided in the policies. We will discuss these questions in the same order they appear in Petitioner's Brief.

FIRST PROPOSITION.

Was respondent entitled to interest prior to the date of the judgments?

The Trial Court was of the opinion the question of interest was one of law and with the consent of all parties passed upon that question, after the verdicts were returned. Accordingly he instructed the Jury (R. 412) it should not take into consideration the

question of interest as that question would be determined by the Court as a matter of law.

The policies provide a period of sixty days after the fire for furnishing proofs of loss, and further provide the insurer shall have sixty days after proofs of loss are furnished within which to pay the amount of the loss.

The Trial Court found the proofs of loss were waived within the first sixty-day period and consequently that the loss should have been paid within one hundred and twenty days after the fire. The fire occurred January 2, 1926; therefore, after the verdicts were returned fixing the amount of the loss, the Court in rendering judgment added interest at six per cent per annum from May 2, 1926.

Petitioners have raised no question as to the manner in which interest was allowed but take the position respondent was not entitled to interest at all prior to the date of the judgments.

Petitioners contend the question of interest is controlled by Section 5972 Compiled Oklahoma Statutes 1921, which is quoted in their brief. We contend it is not controlled by that statute. That statute deals with interest upon damages. This is not an action to recover damages but one to recover money due upon contract. Apparently the Circuit Court of Appeals was of the opinion Section 5972 Compiled Oklahoma Statutes 1921 did not apply as it did not discuss that section nor any of the Oklahoma decisions construing it. It does quote Section 5977 Compiled Oklahoma Statutes 1921, which reads:

> "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

Thus the State has by express statutory enactment declared that for the breach of an obligation to pay money only, interest shall be added to the amount due. The cause of action here is for the breach of an obligation to pay money only. This Court in *Morley vs. Lake Shore Railway Co.*, 146 U. S. 162 at 168 says when the State has so provided, interest is recoverable.

Petitioners rely upon *City of Chickasha vs. Hollingsworth*, 56 Okla. 341, 155 Pac. 859; *St. Paul Fire and Marine Insurance Company vs. Robinson*, 72 Okla. 269, 180 Pac. 702; *Midland Valley Railway Co. vs. Price*, 127 Okla. 106, 260 Pac. 26; *Speed vs. McMurray*, 73 Okla. 325, 176 Pac. 506; *Hartford Fire Insurance Co. vs. Barnard*, 99 Okla. 44, 221 Pac. 1011; and, *American Eagle Fire Insurance Co. vs. Lively*, 142 Okla. 246, 286 Pac. 797.

City of Chickasha vs. Hollingsworth, supra (decided in 1916) was not an action to recover upon a contract but was for damages on account of having been prevented from fulfilling a contract.

The next case in point of time is *St. Paul Fire and Marine Insurance Company vs. Robinson, supra* (decided April 29, 1919). True that action was to recover upon an insurance policy for loss to growing crops caused by hail. Less than five dollars in interest was involved and the Court held interest was not recoverable prior to judgment, citing *City of Chickasha vs. Hollingsworth, supra*, and no other authority.

Speed vs. McMurray, supra, was for recovery of damages on account of fraud in the exchange of real estate. The Court cites *City of Chickasha vs. Hollingsworth, supra*, only.

In the *City of Oklahoma City vs. Hoke*, 75 Okla. 211, 182 Pac. 692 (decided July 29, 1919) the Court held the plaintiff was entitled to interest upon damages caused to growing crops by flood waters.

The next case in point of time is *Hartford Fire Insurance Company vs. Barnard, supra* (decided December 11, 1923). There the Court held the plaintiff was entitled to interest upon the amount recovered on a fire insurance policy on account of the loss of a used or secondhand automobile. The opinion does not refer to *St. Paul Fire and Marine Insurance Co. vs. Robinson, supra,* but does cite with approval (among other authorities) *Bernard vs. Rochester German Insurance Co.*, 79 Conn. 388, which is cited with approval by the Circuit Court of Appeals in the instant case.

Midland Valley Railway Co. vs. Price, supra, cited by petitioners (decided October 11, 1927) was an action to recover damages for the death of cattle and the expense of burial. The Court held plaintiff was entitled to interest on the amount of his recovery. On the same date, to wit October 11, 1927, the Court decided *City of Tulsa vs. Copp*, 127 Okla. 128, 260 Pac. 16 and held the plaintiff was entitled to interest upon the damage to the wall of the building caused by an excavation for a sewer. It would seem the cost of replacement of a building is as capable of definite ascertainment as the repair of a building. The Court there interpreted the meaning of Section 5972 Compiled Oklahoma Statutes 1921, as follows:

> "It would appear that the proper test to be applied as to whether interest should be allowed before judgment in a given case is not whether the damages are unliquidated or otherwise, but

> whether the injury and consequent damages are complete and not continuing, and can or must be ascertained of a particular time, in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their own opinion or best judgment in assessing the amount to be allowed for past as well as for future injuries or elements that cannot be measured by any fixed standard of value."

Also in holding that the cost of construction or repair of the building is capable of being made certain within the meaning and intent of said section, the Court says:

> "Under present day methods of engineering, construction and standards of value and cost, it would be as possible to ascertain the approximate and reasonable cost of the construction or repair of a building of the character involved in this action, as it would be to ascertain the value of personal property having a fixed or market value, such cost being arrived at by computation of cost of material, labor, and other well-known elements of cost."

It will be seen that by an unbroken line of decisions by the Oklahoma Supreme Court from July 29, 1919, down to October 11, 1927, in almost every conceivable kind of a case, it was held interest was recoverable. It had been the rule as declared by the Oklahoma Court since December 11, 1923 (*Hartford Fire Insurance Co. vs. Barnard, supra*) that interest was recoverable in an action upon a fire insurance policy. This state of the Oklahoma decisions remained undisturbed until April 8, 1930. Thus when these con-

tracts of insurance were made (October 24, 1925); also at the time of the loss (January 2, 1926); also at the time of the trial in the District Court and at the time the case was briefed, argued and submitted to the Circuit Court of Appeals, it was the rule in Oklahoma (as expressly declared by the Oklahoma Supreme Court) that interest was recoverable. April 8, 1930 (ten days before the opinion by the Circuit Court of Appeals) the Oklahoma Court in *American Eagle Fire Insurance Company vs. Lively, supra,* an action to recover on a fire insurance policy for the loss of household goods held that interest was not recoverable.

We believe we are entitled to some protection in having our contract rights enforced according to the law as declared at the time we made our contracts and at the time we sustained the loss and became entitled to our money. *Wade v. Travis County,* 174 U. S. 499, *Burgess v. Seligman,* 107 U. S. 20, and *Kuhn v. Fairmont Coal Co.,* 215 U. S. 349.

We also believe the United States District Court is entitled to some protection in having decided the question in accordance with the rule then existing in the State Courts and likewise the Circuit Court of Appeals in its decision which does not conflict with the decisions of the Oklahoma Court as they existed at the time the case was submitted to that Court. *Burgess v. Seligman, supra,* at p. 34.

It would seem there is no established rule in Oklahoma upon this question. The first insurance case is *St. Paul Fire and Marine Insurance Co. v. Robinson, supra.* There the Court held interest could not be recovered. The next insurance case is *Hartford Fire Insurance Company vs. Barnard, supra.* In that case

the Court held interest was recoverable and does not mention *St. Paul Fire and Marine Insurance Co. vs. Robinson, supra.* Then in the last case, *American Eagle Fire Insurance Co. vs. Lively, supra,* the Court holds interest is not recoverable but does not mention its opinion to the contrary in *Hartford Fire Insurance Co. vs. Barnard, supra.*

We have examined the briefs in *American Eagle Fire Insurance Co. vs. Lively, supra,* and they do not refer to the opinion in *Hartford Fire Insurance Co. vs. Barnard, supra.* We respectfully submit more careful consideration was given this question in the opinion in *Hartford Fire Insurance Co. vs. Barnard, supra,* than in either of the other two insurance cases mentioned.

This apparent confusion in opinions by the Oklahoma Court is doubtless due in part to the fact the question of interest in most cases is of minor importance. Here it involves more than Ten Thousand Dollars ($10,000.00).

The Supreme Court of Wisconsin in *Laycock vs. Parker,* 103 Wisc. 161, 79 N. W. 327, said:

> "The question of interest is one much more often passed upon than carefully considered by the courts. It is usually presented only incidentally to much more important issues, and often decided one way or the other at the close of exhaustive investigation of the other questions, and with the perhaps unconscious feeling that it is not of sufficient magnitude to justify further serious labor."

The Circuit Court of Appeals in its opinion in the instant case quotes this court in *Miller vs. Robertson,* 266 U. S. 243 at 257, 258, in part as follows:

"One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Curtis v. Innerarity*, 6 How. 146, 154. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. *Spaulding v. Mason*, 161 U. S. 375, 396."

Therefore, as a matter of right, equity and good conscience, respondent should have interest upon the amount due. The Trial Court found (and the Circuit Court of Appeals affirmed that finding) the amount due from petitioners to respondent should have been paid not later than May 2, 1926. Thus petitioners seek to use respondent's money from May 2, 1926 to January 18, 1929 (date of judgment) without interest and notwithstanding the fact petitioners admitted at the time settlement was attempted (R. 16) that they were liable for approximately $56,000. In cases of this magnitude, if they are not liable for the interest it would always be to their advantage to refuse settlement as they would have the use of the insured's money during litigation without cost.

This Court in *Standard Oil Co. vs. United States*, 267 U. S. 76 (an insurance case) held the government was liable for interest prior to judgment. That case involved loss of or damage to a vessel and its cargo. The loss suffered was as difficult of ascertainment as here.

For other cases on the right to recover interest prior to judgment, see the following:

The Scotland, 105 U. S. 24 at 35; *Southern Pacific Co. v. Arnett,* 126 Fed. 75 (8 C. C. A.); *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *Cox v. McLaughlin,* 76 Cal. 60, 18 Pac. 100; *Huchberger v. Home Fire Ins. Co.,* 12 Fed. Cases 793, Case No. 6821; *Firemen's Fund Ins. Co. v. Haley,* 129 Miss. 525, 92 So. 635; *Cottingham v. National Mutual Church Ins. Co.,* 209 Ill. App. 557, 124 N. E. 822; *Columbia Real Estate & Trust Co. v. Royal Exchange Assurance,* 132 S. C. 427, 128 S. E. 865; *Berry v. Virginia State Ins. Co.,* 83 S. C. 13, 64 S. E. 859; *Olson v. Herman Farmers Mutual Ins. Co.,* 187 Wis. 15, 203 N. W. 743; *Aetna Ins. Co. v. Solomon,* 172 Ark. 169, 287 S. W. 1000; *Continental Ins. Co. v. Nabors* (Texas Civ. App.), 6 S. W. (2d) 151; *Home Ins. Co. v. Bennett* (Texas Civ. App.), 9 S. W. (2d) 432; *Baker v. Northern Assurance Co.,* 214 Mich. 540, 183 N. W. 61, and *Reed v. Continental Ins. Co.* (Del.), 65 Atl. 569.

It seems to us Section 5972 Compiled Oklahoma Statutes 1921, relied upon by petitioners, and dealing with interest upon unliquidated damages, is not applicable to the case here presented. This is not an action to recover unliquidated damages but is an action to recover money due upon contract. That being true, Section 5977 Compiled Oklahoma Statutes 1921 is applicable and expressly provides for interest. A construction by the Oklahoma Supreme Court of a State Statute that is not applicable to the question presented is certainly not binding upon this Court.

Summarized, our position is:

1. As a matter of right, equity and good conscience, respondent should recover interest from the time the loss should have been paid unless there be some well

established rule denying that right which is binding upon this Court.

2. Not only is there no well established rule denying that right, but the Oklahoma statute, Section 5977 Compiled Oklahoma Statutes 1921 expressly commands that interest be allowed.

3. Should we be mistaken in our view that Section 5972 Compiled Oklahoma Statutes 1921 is not applicable, then we say there is no well established rule of construction of that statute by the Oklahoma Court and that this Court should interpret the law of Oklahoma upon this question.

4. The decisions by the Oklahoma Court were clearly in favor of our right to the interest at the time we entered into these contracts of insurance; at the time we sustained our loss; at the time the money became due and payable and at the time we obtained our judgments. Those rights should not now be taken from us by a decision since rendered by the Oklahoma Court and especially one that does not overrule nor mention the long line of cases supporting our right to interest.

5. The judgments in these cases were, at the time rendered, clearly in accord with the Oklahoma decisions and should not now be disturbed.

SECOND PROPOSITION.

Do the amended petitions state facts sufficient to constitute a cause of action? Petitioners contend they do not for the reason proofs of loss were not furnished in the strict manner provided in the policies.

The amended petitions allege that respondent school

district complied with all the terms and conditions of the policies except the provision providing for written verified proofs of loss to be furnished within sixty days after the fire. As to that provision respondent alleges both waiver and estoppel. The question is, first, can such provision be waived by conduct, or the insurer by conduct be estopped to insist upon a compliance with such provision before it is liable; and second, do the amended petitions state facts sufficient to constitute waiver or estoppel or both. The amended petitions are found in the record at 12, 50, 75, and 100. The allegations in each of these cases are substantially the same. In the interest of brevity, we will not quote from the petitions but will state the substance of the allegations necessary for consideration of this question.

In substance the allegations are the policies were issued to respondent on October 24, 1925, through the local agents of the several insurance companies here involved. By these policies respondent school building was insured for $75,000.00 against loss by fire and the furniture and equipment therein for $3,400.00. On January 2, 1926, the building, furniture and equipment were completely destroyed by fire. Respondent within a few hours thereafter, notified the local agents who issued the policies and requested that they notify their respective companies. Within two or three days thereafter each of the companies appointed agents and adjustors (naming them) as their duly authorized agents to investigate the fire, make estimates as to the value of the property destroyed, and settle for said loss. Said agents visited the scene of the fire, made examinations as to the value of the property destroyed and the circumstances

surrounding the fire. Said agents had respondent furnish them the items of the property destroyed and the plans and specifications of the building. At the request of said agents, respondent rendered such assistance as it could to Frank Kebelman, a building contractor selected by said agents to make an estimate of the value of the property destroyed. Thereafter on February 27, 1926, same being the fifty-sixth day after the fire, said agents including said building contractor met with respondent's school board at the scene of the fire for the purpose of discussing a settlement and adjustment of the loss. At said meeting said agents stated to respondent's school board that they had made full and complete investigation as to said fire and the value of the property destroyed and had obtained all and the correct information thereon. Said agents stated there was no question as to the loss of $3,400.00 on the furniture and equipment, and they were ready to pay that sum on that part of the loss. They stated the building was overvalued and could be replaced for approximately $53,000. Said agents then offered respondent approximately $56,000 in full payment for its entire loss on the building, furniture and equipment. Respondent then and there rejected said offer and requested said companies, through their said agents, to replace said building since they contended it could be replaced for approximately $53,000, and since they (said agents) had said building contractor there with his figures to show it could be replaced for said amount. Said agents then and there refused to replace said building.

The only difference between said agents and respondent was the replacement value of said building

which said agents contended was approximately $53,000 and respondent contended was $75,000.00. At said meeting respondent's attention was directed only to the value of said building, and that was the only matter over which there was any disagreement. There was no objection made at any time that proofs of loss had not been furnished, and there was no request for the same. Said conduct of said agents led respondent to believe that the only matter in dispute was the value of the building destroyed. Said companies through the examinations and efforts of their said adjustors and by the assistance of respondent's school board, rendered at the request of said adjustors, obtained all the information that could have been obtained had proofs of loss been furnished in the strict manner provided in the policies. Said adjustors led respondent to believe that they had all the information they desired and that no other or further information or proof was required; that by said conduct and by reason of said facts, said companies waived the furnishing of proofs of loss in the strict manner provided in the policies and that said companies by reason of said facts are now estopped to set up said failure to furnish said proofs of loss as a defense to these actions.

The Trial Court and also the Circuit Court of Appeals held said allegations sufficient to constitute waiver and estoppel.

It seems petitioners do not challenge the sufficiency of these allegations provided waiver or estoppel by conduct can result but apparently take the position there can be no waiver unless such waiver be in writing and attached to the policy.

The Circuit Court of Appeals in the instant case

cites many cases in support of its holdings and is, we believe, in accord with the almost universal rule upon this question.

Petitioners cite no case by this court to the contrary on this question. They cite only one opinion by the Circuit Court of Appeals to the contrary and that is the early case of *Scottish Union and National Insurance Co. vs. Encampment Smelting Co.*, 166 Fed. 231 by the Eighth Circuit. The Court there based its holding largely upon the opinion of this court in the *Northern Assurance Co. vs. Grand View Building Association*, 183 U. S. 308. The latter case did not involve proofs of loss but a covenant against other insurance.

The Eighth Circuit has in two recent opinions virtually departed from its former holding or at least expressed considerable doubt as to the correctness of that holding. *New York Underwriters Fire Insurance Co. vs. Malham & Company*, 25 Fed. (2d) 415, and *Hartford Fire Insurance Co. vs. Empire Coal Co.*, 30 Fed. (2d) 794.

All other cases relied upon by petitioners (except perhaps one or two district court opinions) deal with provisions to be kept or performed before loss occurs; a condition of the insurance; not a condition subsequent to facilitate adjustment of the loss but a condition precedent to liability. For these reasons the Sixth Circuit in *Continental Insurance Co. v. Fortner*, 25 Fed. (2d) 398 and the Ninth Circuit in *Twin City Insurance Co. v. Stockman's National Bank*, 261 Fed. 470, say *Northern Assurance Co. vs. Grand View Building Association*, 183 U. S. 308, and *Lumber Underwriters vs. Rife*, 237 U. S. 605, are to be distinguished from cases holding proofs of loss

may be waived by conduct. This same distinction, if it be sound, applies to *Imperial Fire Insurance Co. vs. County of Coos*, 151 U. S. 452 and *Penman vs. St. Paul Fire and Marine Insurance Co.*, 216 U. S. 311, cited by petitioners.

The Fifth Circuit made the same distinction in *Home Insurance Co. vs. High Tower*, 22 Fed. (2d) 882, in which it said:

> "Provision of policy to effect that conditions thereof cannot be waived have no application to waiver after loss."

This Court denied Certiorari in the above case, 276 U. S. 634.

This Court in *Royal Insurance Co. vs. Martin*, 192 U. S. 149 at 162, held that proofs of loss were waived where the insurer denied liability or refused to pay in any event. That opinion is squarely against petitioner's contention that proofs of loss cannot be waived except by endorsement in writing upon the policy. It would seem if it could be waived by one method of conduct, it could by another.

This Court in *Thompson vs. Phoenix Insurance Co.*, 136 U. S. 287, held that a provision of a policy limiting the time for commencement of an action was waived by conduct.

Other cases holding limitation provisions of a policy may be waived by conduct are:

Steel v. Phoenix Insurance Co., 51 Fed. 715 (9 C. C. A.)

Lynchburg Cotton Mill Co. v. Travellers Insurance Co., 149 Fed. 954 (4 C. C. A.)

Fellman v. Royal Insurance Co., 184 Fed. 577 (5 C. C. A.)

Jackson v. Fidelity and Casualty Co., 75 Fed. 359 (5 C. C. A.)

Other cases holding proofs of loss may be waived by conduct are:

Globe & Rutger's Insurance Co. vs. Prairie Oil & Gas Co., 248 Fed. 52 (2 C. C. A.)

Alliance Insurance Co. vs. Enders, 293 Fed. 485 (9 C. C. A.)

Firemen's Insurance Co. vs. Brooks, 32 Fed. (2d) 451 (6 C. C. A.)

Thus we have the Second, Fourth, Fifth, Sixth, Ninth and Tenth Circuits holding that provisions of a policy to be performed after a loss may be waived by conduct, and the only decisions to the contrary is that of *Scottish Union and National Insurance Company v. Encampment Smelting Company, supra*, by the Eighth Circuit.

The decisions of the courts of last resort of each of the States embraced within the Tenth Circuit are to the same effect

Kansas:

German Insurance Co. v. Gray, 43 Kan. 497, 23 Pac. 637.

Ross et al. v. Phenix Ins. Co., 84 Kan. 572, 114 Pac. 1054.

Ring v. Phoenix Assurance Co., 100 Kan. 341, 164 Pac. 303.

Clark v. Milwaukee Mechanic's Ins. Co., 105 Kan. 728, 185 Pac. 1056.

Colorado:

Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. A. 264, 53 Pac. 242.

American Century Ins. Co. v. Donlon, 16 Colo. A. 416, 66 Pac. 249.

Hartford Fire Ins. Co. v. Hammond, 41 Colo. 323, 92 Pac. 686.

Wyoming:

Kahn v. Traders Ins. Co., 4 Wyo. 419, 34 Pac. 1059.

New Mexico:

Robinson v. Palatine Ins. Co., 11 N. M. 162, 66 Pac. 535.

Oklahoma:

Western National Ins. Co. v. Marsh, 34 Okla. 414, 125 Pac. 1094.

State Mutual Ins. Co. v. Green, 62 Okla. 214, 166 Pac. 105.

Hartford Fire Ins. Co. v. Sullivan, 74 Okla. 241, 179 Pac. 24.

American Ins. Co. v. Ott, 97 Okla. 125, 223 Pac. 121.

Atlas Assurance Co. v. Leonard, 108 Okla. 150, 234 Pac. 771.

Great American Ins. Co. v. Herrington, 127 Okla. 13, 259 Pac. 582.

Utah:

West v. Norwich Union Fire Ins. Co., 10 Utah 442, 37 Pac. 685.

Osborne v. Phenix Ins. Co., 23 Utah 428, 64 Pac. 1103.

Loftis v. Pacific Mutual Ins. Co., 38 Utah 532, 114 Pac. 134.

We submit the decision of the Tenth Circuit on this question in the case at bar is in accord with the great weight of authority and should not be disturbed.

CONCLUSION.

We respectfully submit the decision of the Circuit Court of Appeals is correct on both questions presented and should be in all things affirmed.

Respectfully submitted,

R. M. Rainey,
Streeter B. Flynn,
Frank G. Anderson,
Counsel for Respondent.

Chester H. Lowry,
Rainey, Flynn, Green & Anderson,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 278, 279, 280, 281.—October Term, 1930.

Concordia Insurance Company of Milwaukee, Petitioner,
278 *vs.*
School District No. 98 of Payne County, State of Oklahoma.

Royal Insurance Company, Ltd., Petitioner,
279 *vs.*
School District No. 98 of Payne County, State of Oklahoma.

National Fire Insurance Company, Petitioner,
280 *vs.*
School District No. 98 of Payne County, State of Oklahoma.

Fire Association of Philadelphia, Petitioner,
281 *vs.*
School District No. 98 of Payne County, State of Oklahoma.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 24, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

These cases, involving identical questions, arose in the State of Oklahoma and were removed from a state court to a federal district court where they were consolidated and tried. They were brought to recover upon separate policies of insurance issued by the petitioners, respectively, for loss and damage sustained by fire. A jury in the trial court found the issues in favor of respondent, and judgment was entered for the amount of the verdict with an additional sum for interest from the date when the liability accrued.

Upon appeal to the circuit court of appeals, that court struck from the transcript the bills of exceptions, and the consolidated causes were disposed of as upon demurrers to the amended complaints. 40 F. (2d) 379.

Certiorari from this court was asked upon two grounds, (1) that the court below had construed a statute of Oklahoma, relating to the allowance of interest, contrary to the construction put upon it by the state supreme court; and (2) that there was a conflict between the decision below and one rendered by the Circuit Court of Appeals for the Eighth Circuit in respect of the contention that the requirement contained in the policies that proofs of loss must be furnished within sixty days could not be waived except in writing.

We consider these grounds in the reverse order.

First. Each of the policies provided that in case of fire immediate notice in writing of any loss should be given to the company, and within sixty days a statement should be rendered, signed and sworn to by the insured, setting forth the time and origin of the fire, the interest of insured and others in the property, the cash value of the items and amount of loss upon each, and other particulars; that the company should not be held to have waived any provision or condition of the policy by any requirement, act or proceeding on its part relating to the appraisal, or any examination provided for; that the loss should not become payable until sixty days after the notice, ascertainment, estimate, and proof of loss had been received by the company, including an award by an appraiser when appraisal had been required; that no person, unless duly authorized in writing, should be deemed an agent of the insurer in any matter relating to insurance; that no officer, agent, or other representative should have power to waive any provision or condition of the policy except such as by the terms of the policy might be the subject of agreement endorsed thereon or added thereto; and that *no waiver should be effective unless written upon or attached to the policy.*

The complaints contained pleas of waiver and estoppel, the substance of which we adopt from the opinion of the court below:

"The amended complaints alleged that on January 2, 1926, and within two or three hours after the fire had destroyed the building and furniture and fixtures therein, the plaintiff notified appellants'

agents of the fire and the extent of the damage and destruction, with the request that they notify their companies. That within two or three days thereafter the appellants selected named persons to represent them and authorized such persons to investigate the fire and make estimates as to the value of the property destroyed and settle for the loss; that these adjusters for the insurers visited the scene of the fire and made examinations as to the value of the property destroyed and the circumstances surrounding the fire, and had plaintiff furnish them with the items of the property destroyed, the plans and specifications of the building, which plaintiff furnished, and requested plaintiff to furnish assistance to a building contractor selected and appointed by the insurers and their adjusters, who was to make estimates of the value of the property destroyed and collect information as to its condition at the time of the loss; that thereafter on the 27th day of February, 1926, which was the 56th day after the fire, the said adjusters and the members of the plaintiff's board of trustees held a meeting at the scene of the fire; that said building contractor was at said meeting; that said meeting was held for the purpose of discussing the settlement and adjustment of the loss sustained by plaintiff; that thereupon all of the insurers, acting through their said adjusters and agents, stated to plaintiff's board that they had made full and complete investigation as to the fire and the market value of the building and furniture and fixtures therein destroyed by said fire and had obtained all and the correct information thereon, that there was no question as to the loss upon the furniture and fixtures in the sum of $3,400.00 and that appellants were then and there ready to pay plaintiff that sum for its loss on the furniture and fixtures; that said insurers, through their adjusters and agents, at the same time stated that said building was overvalued and could be replaced for the sum of approximately $53,000, and then offered the sum of approximately $56,000 as full payment for all of the loss to both said buildings and furniture and fixtures destroyed; that plaintiff declined to accept said amount and requested the insurance companies, through their adjusters, to replace said building, this however the insurers refused to do; that plaintiff's board at said meeting contended that the value of the building was $75,000; that the value of the building and its replacement cost were the only matters discussed as to which there was any disagreement; no objection was made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that the insurers at said meeting, by their conduct in offering to pay the full amount of insurance upon the furniture and fixtures and in offering to pay the sum of $53,000 for the loss of the building, led the plaintiff to believe that the only matter in

dispute was the market and replacement value of the building, the appellants contending on the one hand that the market and replacement value was the sum of $53,000 and the plaintiff contending that the value was $75,000, and that by reason of the facts stated appellants waived the furnishing of proofs of loss in strict accordance with the provisions of the policies and are estopped to set up and claim such failure to furnish proofs; that appellants, through the examinations and efforts of their adjusters and the assistance of plaintiff's board rendered at the request of the adjusters obtained all the information which could have been obtained had proof of loss been furnished in strict conformity to the policies and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss."

Upon demurrer these allegations must be taken as true. And, unless the stipulation contained in the policy that any waiver to be effective must be written upon or attached to the policy stands in the way, it is clear that the facts alleged are sufficient to constitute a waiver of, or, what amounts to the same thing, an estoppel against setting up, the condition requiring verified proofs of loss to be furnished within sixty days. See *Firemen's Ins. Co.* v. *Brooks*, 32 F. (2d) 451, 452; *Continental Ins. Co.* v. *Fortner*, 25 F. (2d) 398, 401, *et seq.* Cf. *Insurance Co.* v. *Wolff*, 95 U. S. 326, 333. That the stipulation does not stand in the way is settled by the great preponderance of federal and state decisions. The rule deducible from these authorities is that such a stipulation has reference to those provisions and conditions which constitute part of the contract of insurance, and does not apply to a waiver, after the loss occurs, of stipulations in respect of things to be done subsequent to the loss as prerequisites to adjustment and payment. It is enough to cite as examples—*Continental Ins. Co.* v. *Fortner*, *supra*, p. 402; *Home Ins. Co.* v. *Hightower*, 22 F. (2d) 882, 885; *Twin City Fire Ins. Co.* v. *Stockmen's Nat. Bank*, 261 Fed. 470, 476.

With some exceptions, the cases decided by this court, relied upon by petitioners (e. g., *Lumber Underwriters* v. *Rife*, 237 U. S. 605), merely apply the familiar principle that parol proof may not be received to vary the terms of a written instrument; and nothing in any of them is in conflict with the rule as above stated. *Scottish Union & Nat. Ins. Co.* v. *Encampment Smelting Co.*, 166 Fed. 231, supports petitioners' contention; and it was because of the conflict created by that case that the certiorari here was granted.

We cannot accept the theory of that case. It is out of harmony with the general current of authority, and with the views we have expressed. A late decision of the Circuit Court of Appeals for the Eighth Circuit clearly indicates that if the same question were again before that court the *Scottish Union* case would not be followed. *Hartford Fire Ins. Co.* v. *Empire Coal Min. Co.*, 30 F. (2d) 794, 802.

Second. The trial court allowed interest upon the amount of the loss beginning sixty days from the last date upon which proofs of loss were due under the terms of the policies. The contention is that the allowance of interest in a case of this kind is controlled by § 5972, Complied Oklahoma Statutes, 1921, and that that statute as construed by the State Supreme Court does not allow interest prior to the rendition of judgment. The section referred to reads:

"Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

The general rule that a federal court will follow the decisions of the highest court of a state construing a state statute is, of course, well established. The difficulty here is that, prior to the judgment of the federal district court in this case allowing interest, the decisions of the Supreme Court of Oklahoma were in such confusion that the view of that court in respect of the meaning of the statute, as applied to the present case, could not definitely be determined.

In *City of Chickasha* v. *Hollingsworth et al.*, 56 Okla. 341, it was held that interest could not be recovered upon unliquidated damages where a judgment on verdict was necessary in order to ascertain the amount; and that decision was followed in *St. Paul Fire & Marine Ins. Co.* v. *Robison*, 72 Okla. 269, where the action was under a hail insurance policy to recover for damages to a crop of cotton. On the contrary, in *City of Oklahoma City* v. *Hoke*, 75 Okla. 211, it was held that in an action for the destruction of crops due to an overflow caused by the maintenance of a dam, damages and interest from the time of the injury must be allowed on the ground that the value of the property destroyed

was susceptible of computation. And again in *Hartford Fire Insurance Co.* v. *Bernard,* 99 Okla. 44, in an action upon a fire insurance policy for unliquidated damages, it was held that, since the amount could be ascertained by calculation based on the reasonable market value of the property insured, interest should be allowed from the time when the insurance company should have satisfied the claim. In the still later case of *Midland Valley R. Co.* v. *Price,* 127 Okla. 106, where the action was for death of cattle caused by the negligence of a common carrier, and damage for the loss was based on the market value, it was held that interest was recoverable from the date of the injury.

From an examination and comparison of these cases and others it is evident that the federal trial court could not say that the State Supreme Court definitely had so construed the statute as to deny to the insured the right to recover interest from the date when payment for the loss should have been made; and the federal court was free to construe the statute for itself.

Petitioners, however, rely upon *American Eagle Fire Ins. Co.* v. *Lively,* 142 Okla. 246, as finally having settled the question in harmony with their contention. Whether it does so is, at least, doubtful. The action there was upon a fire insurance policy, the property destroyed consisting mostly of library books and some household furniture. In disposing of the question of interest the court said:

"Considering the nature of the property destroyed and the difficulty in ascertaining the actual or fair value thereof, we think interest should not have been allowed until the claim was reduced to judgment."

Assuming this to be a correct exposition of the statute as applied to that case, it does not follow, in the light of some of the other decisions digested above, that the same rule would be applied to the destruction of a house, the replacement or fair value of which could be ascertained without much difficulty. But that inquiry may be put aside since the decision was handed down on April 8, 1930, more than a year after the present judgment had been entered by the federal district court, and whatever may be the prospective effect of this last decision it cannot be given a retroactive effect in respect of the judgment of the federal district court so as to "make that erroneous which was not so when the judgment of that court was given." *Morgan* v. *Curtenius et*

al., 20 How. 1, 3; *Pease* v. *Peck*, 18 How. 595, 598; *Roberts* v. *Bolles*, 101 U. S. 119, 128-129; *Burgess* v. *Seligman*, 107 U. S. 20, 35; *Edward Hines Trustees* v. *Martin*, 268 U. S. 458; *Fleischmann Co.* v. *Murray*, 161 Fed. 162.

The circuit court of appeals thought that the matter of interest was controlled by § 5977, Compiled Oklahoma Statutes, 1921, which provides:

"The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

Here the insurance companies had admitted their liability in the sum of $3,400 for furniture and fixtures and in the sum of $53,000 for the building, the latter amount being based upon what they insisted would be the cost of replacement. The only dispute between the parties was as to the latter item. Respondent contended that the value of the building was $75,000, but expressed a willingness and desire to have petitioners make the replacement. Under the terms of the insurance contracts the companies became liable to pay the amount of the loss not later than sixty days after proof of loss, or within one hundred and twenty days in all from the date of the loss. In the light of these facts it is immaterial whether § 5972 or § 5977 be invoked. In the absence of an authoritative state decision to the contrary, there was nothing in either which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court had recognized, namely, that, even in a case of unliquidated damages, "when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." *Miller* v. *Robertson*, 266 U. S. 243, 257-259, and cases cited. See also *Standard Oil Co.* v. *United States*, 267 U. S. 76, 79; *Bernhard* v. *Rochester German Ins. Co.*, 79 Conn. 388, 397. Under the facts disclosed by the record, the principles established by these decisions fully justified the allowance of interest made by the district court in this case.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.